CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 33

THE UNITED STATES OF AMERICA, PETITIONER

vs.

THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 27, 1935

CERTIORARI GRANTED OCTOBER 14, 1935

No. 7436

United States

Circuit Court of Appeals

For the Ninth Circuit.

THE STATE OF CALIFORNIA,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Parker Printing Company, 545 Sansome Street, San Francisco.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 33

THE UNITED STATES OF AMERICA, PETITIONER

vs.

THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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NAMES AND ADDRESSES OF ATTORNEYS

U. S. WEBB,
Attorney General, State of California
RALPH O. MARRON,
Deputy Attorney General,
WILLIAM T. SWEIGERT,
State Bldg.,
San Francisco, Calif.
Attorneys for Appellant.

H. H. McPIKE,
U. S. Attorney
MORRIS R. CLARK,
Asst. U. S. Attorney
P. O. Bldg.,
San Francisco, Calif.
M. C. LIST,
Washington, D. C.
Attorneys for Appellee.

In the District Court of the United States for the Northern District of California, Southern Division.

No. 19246-S

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE STATE OF CALIFORNIA,
Defendant.

COMPLAINT

Now comes the United States of America, by Geo. J. Hatfield, United States Attorney for the Northern District of California, and brings this action on behalf of the United States against the State of California, operating what is known as the State Belt Railroad through a Board of State Harbor Commissioners consisting of P. W. Meherin, J. J. Tynan, and Jos. A. Moore, and having an office and place of business at San Francisco in the State of California; this action being brought upon suggestion of the Attorney General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission. [1*]

For a Cause of Action plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

*Page numbering appearing at the foot of page of original certified Transcript of Record.

Plaintiff further alleges that in violation of the Act of Congress known as the Safety Appliance Act, approved March 2, 1893 (27 Statutes at Large, 531), as amended by an Act approved April 1, 1896 (29 Statutes at Large, 85), and as amended by an Act approved March 2, 1903 (32 Statutes at Large, 943), contained in U. S. Code, title 45, secs. 1 to 10 inclusive, defendant, on February 20, 1932, hauled on its line of railroad, over a part of a highway of interstate commerce, one car, to wit: W. P. box No. 16113.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad in and about San Francisco, in the State of California, within the jurisdiction of this court, when the coupling and uncoupling apparatus on the "A" end of said car was out of repair and inoperative, the uncoupling lever being disconnected from lock lift of coupler on said end of said car, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by Section 2 of the Safety Appliance Act, as amended by Section 1 of the Act of March 2, 1903. (U. S. Code, title 45, secs. 2 and 8.)

Plaintiff further alleges that by reason of the violation of the said Act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars. [2]

WHEREFORE, plaintiff prays judgment against said defendant in the sum of One Hundred dollars and its costs herein expended.

GEO. J. HATFIELD
United States Attorney
Attorney for Plaintiff.

[Endorsed]: Filed May 25, 1932. [3]

[Title of Court and Cause.]

SUMMONS

The President of the United States of America To The State of California, Defendant.

YOU ARE HEREBY DIRECTED TO APPEAR AND ANSWER the Complaint in an action entitled as above, brought against you in the District Court of the United States, in and for the Northern District of California, Southern Division, within ten days after the service on you of this Summons, if served within this county, or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required the said Plaintiff will take judgment for any money or damages demanded in the Complaint, as arising upon contract or it will apply to the Court for any other relief demanded in the Complaint.

WITNESS the Honorable A. F. ST. SURE, Judge of said District Court, this 25th day of May in the year of our Lord one thousand nine hundred

and thirty-two and of our independence the one hundred and fifty-sixth.

[Seal] WALTER B. MALING, Clerk.
By J. A. Schaertzer, Deputy Clerk. [4]

United States Marshal's Office
Northern District of California

I HEREBY CERTIFY that I received the within writ on the 25th day of May, 1932, and personally served the same on the 25th day of May, 1932, upon State of California by delivering to, and leaving with U. S. Webb, Attorney General for the State of California said defendant named therein personally, at the City and County of San Francisco in said District a certified copy thereof, together with a copy of the Complaint, attached thereto.

San Francisco, May 25th, 1932.

FRED L. ESOLA
U. S. Marshal.
By George W. Kavanaugh
Office Deputy.

[Endorsed]: Received May 25, 1932. U. S. Marshal's Office, San Francisco, Calif.

RETURN ON SERVICE OF SUMMONS

United States of America,
Northern District of California—ss:

I hereby certify and return that I served the annexed Summons on the therein-named State of California, by handing to and leaving a true and correct copy thereof together with Complaint attached thereto with James Rolph, Jr. Governor of

the State of California, personally at Sacramento, California in said District on the Third day of June, A. D. 1932.

FRED L. ESOLA,
U. S. Marshal.
By Wm. M. Ahern
Deputy.

[Endorsed]: Filed Jun 4 1932

[Title of Court and Cause.]

SPECIAL APPEARANCE AND DEMURRER.

COMES NOW the State of California, the defendant herein, and specially appearing under protest for the purpose of this plea, and for no other, says that the court has no jurisdiction over this case for the following reason:

I

That this court has no jurisdiction over the defendant herein in this: That this is a controversy between the United States and a State; that exclusive original jurisdiction of such controversies is in the Supreme Court of the United States.

WHEREFORE defendant prays this cause be dismissed and go hence without day.

U. S. WEBB
Attorney General of the State of California.
RALPH O. MARRON
Deputy Attorney General.
Attorneys for said Defendant.

[Endorsed]: Service of the within Special Appearance and Demurrer by copy admitted this 10 day of Sept. 1932.

GEO. J. HATFIELD
Attorney for .....

Filed Sept 10 1932 [5]

[Title of Court and Cause.]

ORDER

ORDERED that the demurrer of defendant that the court has no jurisdiction for the reason "that exclusive original jurisdiction * * * is in the Supreme Court of the United States" be, and the same is hereby OVERRULED. Defendant may have ten days to answer.

Dated: February 16, 1933.

A. F. ST. SURE
United States District Judge.

[Endorsed]: Filed Feb 16 1933 [6]

[Title of Court and Cause.]

ANSWER

NOW COMES the defendant STATE OF CALIFORNIA and answering the complaint on file herein admits, denies and alleges as follows:

I.

Denies each and every, all and singular the allegations contained in plaintiff's complaint.

As and for a further, separate and distinct answer and defense to the plaintiff's cause of action defendant alleges:

I.

That the State Belt Railroad for about forty-two years last past has been operated under the immediate supervision of various superintendents; that during the year 1932 and at the times involved in plaintiff's complaint on file herein the State Belt Railroad was operated under the immediate supervision of A. R. Pidgeon, Superintendent; that the superintendents of the said State Belt Railroad were appointed by the Board of State Harbor Commissioners and hold office at the pleasure of the said Board of State Harbor Commissioners [7] and are under their general supervision and control as such Board of State Harbor Commissioners; that all inspectors, engineers and yardmen employed in the operation of said State Belt Railroad are Civil Service employees except in cases of emergency employment and that said employees in order to qualify as Civil Service employees must pass an examination for their respective positions; that the said superintendents, inspectors, engineers, yardmen and other employees engaged in the operation of the State Belt Railroad, and all of them, are employees and servants of the State of California.

II.

That the State Belt Railroad is located wholly within the City and County of San Francisco, State of California, and extends the full length of the Embarcadero and Jefferson Street to the Presidio, a distance of approximately five miles; that the State Belt Railroad has a physical connection with the tracks of the Southern Pacific Company near the Embarcadero and Townsend Streets; that its tracks also run on to wharves owned by the State of California and used by freight car ferries of the Southern Pacific Company, the Atchison, Topeka and Santa Fe Railway Company, the Western Pacific Railway Company and the Northwestern Pacific Railway Company, all common carriers engaged in Interstate Commerce by railroad. Adjacent to its main line of road and connecting therewith are certain freight yards of the four interstate carriers above mentioned in which all switching is done by the State Belt Railroad and all cars going into and out of said yards are hauled by the State Belt Railroad; that said yards are owned by the State of California but, by agreement with such interstate carriers, are used by them; that the tracks of the State Belt Railroad also run on to [8] about forty-five wharves owned by the State of California on which said wharves freight is loaded on to, and unloaded from, cars from and on to steamers going to and coming from points within and without the State of California; that none of the tracks of said State Belt Railroad herein mentioned are ever used by any of the carrier roads and no

locomotive other than the locomotives of the State Belt Railroad ever move over any part thereof.

III.

That the said State Belt Railroad is operated by the State of California for the purpose of facilitating the commerce of the Port of San Francisco without any profit being derived therefrom; that the charges made for the services rendered by said State Belt Railroad are made by the Board of State Harbor Commissioners pursuant to the authority conferred upon them by Section 2524 of the Political Code of California which authorizes said Board of State Harbor Commissioners to collect such amount of revenue as will enable them to perform the duties required of them by authority of Article IX of said Political Code; that Section 2526 of the said Political Code expressly limits the amount of money to be collected by such charges to a sum sufficient to meet the operating expenses of said harbor.

IV.

That the operation of the State Belt Railroad is necessary in the interest of and for the benefit of the people of the State of California for the promotion and facilitation of commerce through the Port of San Francisco and that said Railroad is operated solely for such purpose. [9]

V.

That the said State Belt Railroad is operated and managed by a Board of State Harbor Com-

missioners, consisting of P. W. Meherin, J. J. Tynan and Jos. A. Moore; that the said Board of State Harbor Commissioners are officers of the State of California appointed by the Governor, confirmed by the Senate of the State of California, and hold office at the pleasure of the Governor; that all of the property administered by the said Board of State Harbor Commissioners is owned by the State of California; that all revenue received for services rendered by the State Belt Railroad is paid to defendant as such Board of State Harbor Commissioners; that the laws of the State of California provide that all moneys collected by the Board of State Harbor Commissioners shall be paid into the State Treasury at least once each month and be credited to the San Francisco Harbor Improvement Fund.

VI.

That the said State Belt Railroad maintains no repair shops and that the various carriers delivering cars to the State Belt Railroad maintain no repair shops in their yards at which the cars are delivered to the State Belt Railroad for handling; that the State of California, the Board of State Harbor Commissioners and the State Belt Railroad own no cars nor do they haul any cars or freight on their own account.

VII.

That the said Board of State Harbor Commissioners did not as a Board, nor did the members thereof, personally, participate in, or have personal knowledge of, the commission of the allged viola-

tion of the Federal Safety Appliance Act set forth in the complaint herein; that any alleged violation [10] of the Federal Safety Appliance Act occurred without the personal knowledge of the Board of State Harbor Commissioners or any of them, or of the State of California, and without the consent of the Board of State Harbor Commissioners or the State of California and contrary to the orders and instructions of the Board of State Harbor Commissioners of the State of California.

As and for a separate and further answer and defense to the complaint herein, defendant alleges:

I.

That the said District Court has no jurisdiction over defendant in that the defendant, in operating the State Belt Railroad, is performing a governmental function.

WHEREFORE defendant prays that plaintiff take nothing by this action and that defendant be hence dismissed and have judgment against plaintiff for its costs of suit herein expended and for such other and further relief as to the court may seem meet and proper.

U. S. WEBB
Attorney General of the State of California.
RALPH O. MARRON
Deputy Attorney General.
Attorneys for Defendant. [11]

State of California
City and County of San Francisco—ss.

RALPH O. MARRON, being duly sworn, deposes and says:

That he is a citizen of the United States over the age of eighteen years; that he is one of the attorneys for the defendant in the above entitled action; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information and belief and as to those matters he believes them to be true.

RALPH O. MARRON

Subscribed and sworn to before me this 27th day of April 1933.

H. H. LINNEY
Deputy Attorney General.

[Endorsed]: Service of the within Answer by copy admitted this 27 day of Apr. 1933.

I. M. PECKHAM
Attorney for _____.

Filed Apr 27 1933 [12]

[Title of Court and Cause.]

MOTION FOR JUDGMENT.

The above entitled cause having been submitted to the court for decision on the stipulation of facts and on briefs to be filed with the court, the defendant STATE OF CALIFORNIA now moves the

above entitled court for judgment in said cause in favor of the defendant STATE OF CALIFORNIA and against the plaintiff UNITED STATES OF AMERICA.

U. S. WEBB
Attorney General of the
State of California.
RALPH O. MARRON
Deputy Attorney General.
WILLIAM SWEIGERT
Attorneys for Defendant.

[Endorsed]: Filed Jun 6 1933 [13]

[Title of Court and Cause.]

ORDER

This cause was submitted to the Court upon stipulation of facts and plaintiff's motion for judgment and defendant's motion for judgment. After due consideration, it is

ORDERED that plaintiff's motion for judgment be, and the same is hereby GRANTED; that defendant's motion for judgment be, and the same is hereby DENIED; and that judgment be entered herein in favor of plaintiff as prayed for.

Dated: January 16, 1934.

A. F. ST. SURE
United States District Judge.

[Endorsed]: Filed Jan 16 1934 [14]

In the Southern Division of the United States District Court for the Northern District of California.

No. 19246-S

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE STATE OF CALIFORNIA,
Defendant.

JUDGMENT

This cause having come on regularly for trial upon the 16th day of January, 1934, before the Court sitting without a Jury, a trial by Jury having been waived by written stipulation filed; L. E. Kilkenny, Assistant United States Attorney, appearing as attorney for plaintiff, and Ralph O. Marron, Esq., appearing as attorney for defendant, and a Stipulation of Facts having been filed, and the cause having been submitted to the Court for consideration and decision, and the Court after due deliberation having rendered its decision and ordered that judgment be entered herein in favor of the plaintiff, as prayed, and for costs;

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the court that The United States of America, Plaintiff, do have and recover of and from The State of California, Defendant, the sum of One Hundred

Dollars ($100.00), together with its costs herein expended, taxed at $19.60.

Judgment entered this 16th day of January, 1934.

WALTER B. MALING,
Clerk. [15]

[Title of Court and Cause.]

EXCEPTIONS OF DEFENDANT, THE STATE OF CALIFORNIA, TO ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT AND TO JUDGMENT.

Comes now the defendant above named, The State of California, by its attorneys, U. S. Webb, Attorney General of the State of California, and Ralph O. Marron, Deputy Attorney General, and excepts to the ruling and order of the above entitled court made on January 16, 1924, denying said defendant's motion for judgment in its favor and against plaintiff, and ordering that judgment be entered herein in favor of plaintiff as prayed for;

And said defendant further excepts to the judgment of the above entitled court entered herein on January 16, 1934, in favor of plaintiff and against defendant in the sum of One Hundred Dollars ($100.00) and costs, and to the whole of said judgment.

Said exceptions are made and taken on the grounds that said judgment is contrary to the law and the facts stipulated [16] by the parties to said action at the trial, and is not sustained by the facts so stipulated.

Said defendant requests that said exceptions and

each of them be duly noted and entered in the minutes of the above entitled court.

U. S. WEBB
Attorney General of the
State of California.
RALPH O. MARRON
Deputy Attorney General.
Attorneys for Defendant,
The State of California.

The above exceptions of defendant, the State of California, are hereby allowed.

A. F. ST. SURE
United States District Judge.

Dated, Feb. 2, 1934.

[Endorsed]: Service and receipt of a copy of the within Exceptions of Defendant, etc. is hereby admitted and acknowledged this 2nd day of February, 1934.

H. H. McPIKE
Attorney for Plaintiff.

Filed Feb 2 1934 [17]

[Title of Court and Cause.]

STIPULATION AND ORDER EXTENDING TIME WITHIN WHICH TO FILE BILL OF EXCEPTIONS ON APPEAL TO AND INCLUDING FEBRUARY 23, 1934.

It is hereby stipulated and agreed by and between the parties to the above entitled action that The State of California, defendant above named,

may have to and including the 23rd day of February, 1934, within which to prepare, serve and file its Bill of Exceptions on appeal in the above entitled cause, and that the time therefor is hereby extended to and including said date.

H. H. McPIKE
United States Attorney.
NORRIS R. CLARK
Assistant United States Attorney
Attorneys for Plaintiff.
U. S. WEBB
Attorney General of the State of California
RALPH O. MARRON
Deputy Attorney General
Attorneys for Defendant.

It is so ordered:

A. F. ST. SURE
United States District Judge.

Dated: January 24, 1934.

[Endorsed]: Filed Jan 24 1934 [18]

[Title of Court and Cause.]

STIPULATION AND ORDER EXTENDING TIME WITHIN WHICH TO PREPARE, SERVE, FILE, SIGN AND SETTLE DEFENDANT'S BILL OF EXCEPTIONS ON APPEAL TO AND INCLUDING MARCH 24, 1934.

It is hereby stipulated and agreed by and between the parties to the above entitled action that The

State of California, defendant above named, may have to and including the 24th day of March, 1934, within which to prepare, serve, file, and to have signed and settled its Bill of Exceptions on appeal in the above entitled cause, and that the time therefor is hereby extended to and including said date;

And it is further stipulated and agreed by and between said parties that the November term of the above entitled Court is hereby extended to and into the March, 1934 term of said Court and to and including the 24th day of March, 1934, for the [19] purpose of preparing, serving, filing, signing and settling of said Bill of Exceptions.

H. H. McPIKE
United States Attorney
MORRIS R. CLARK
Assistant United States Attorney
Attorneys for Plaintiff.
U. S. WEBB
Attorney General of the State of California
RALPH O. MARRON
Deputy Attorney General.
Attorneys for Defendant.

It is so ordered:

A. F. ST. SURE
United States District Judge.

Dated: February 21, 1934.

[Endorsed]: Filed Feb 21 1934 [20]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 25th day of May, 1932, the above entitled action was commenced by the filing of a complaint and the issuance of a summons; that thereafter and on or about the 10th day of September, 1932, defendant appeared specially therein and filed a special appearance and demurrer; that thereafter said demurrer was set for hearing and on or about September 26, 1932, came on for hearing and was regularly heard and argued in the above entitled court;

AND BE IT FURTHER REMEMBERED that on the 16th day of February, 1933, the above entitled court, Honorable A. F. St. Sure, United States District Judge, presiding, duly and regularly made and filed an order overruling the demurrer of defendant to said complaint and allowing defendant ten days to answer; that thereafter and within the time allowed by law the above named defendant filed its answer to the complaint on file in said action;

AND BE IT FURTHER REMEMBERED that on June 6, 1933, [21] the parties to the above entitled action made and filed in said court the following written waiver of jury trial and stipulation of facts:

[Title of Court and Cause.]

WAIVER OF JURY
and
STIPULATION OF FACTS

Come now the plaintiff and defendant in the above numbered and styled cause, by their respec-

tive attorneys, and hereby stipulate and agree that this cause may be heard and determined by the Court upon the following facts, a jury being hereby expressly waived:

I.

The State Belt Railroad (hereinafter called The Belt) is located wholly within the City and County of San Francisco, California, and extends practically the full length of the Embarcadero and Jefferson Street to the Presidio, a distance of approximately five miles. It has a physical connection with the tracks of the Southern Pacific Company near the Embarcadero and Townsend Street; its tracks also run on to wharves owned by the State of California and used by freight car ferries of the Southern Pacific Company, the Atchison, Topeka & Santa Fe Railway Company, the Western Pacific Railway Company and the Northwestern Pacific Railway Company, all common carriers engaged in interstate commerce by railroad. Adjacent to the line of The Belt and connecting therewith are certain freight yards of the four interstate carriers mentioned, in which all switching is done by The Belt, and all cars going into and out of these yards are hauled by The Belt. [22] These yards are owned by the State of California, and by agreement are used by the interstate carriers mentioned. The tracks of The Belt also run on to about 45 wharves owned by the State of California, on which freight is loaded onto cars from steamers and unloaded therefrom onto cars.

At various points along its line and with which The Belt has trackage connections, are located ap-

proximately 175 industries. All of these industries, the 45 wharves, car ferries and freight yards mentioned, are served exclusively by The Belt, in so far as the movement of loaded and empty cars are concerned. The Belt also moves carload freight and empty cars for loading from and onto the Southern Pacific transfer tracks, such movements being for the limited purpose of interchanging cars. These transfer tracks are for the use of shippers or consignees who do not have industrial or private tracks of their own. Such cars are loaded by the shippers or unloaded by the consignees; no freight is ever loaded or unloaded by The Belt. These transfer tracks are owned and operated by the Southern Pacific, but by agreement The Belt has trackage rights over them for the limited purpose of interchanging cars, as above stated. The Belt moves all carload freight, as well as empty cars, between these industries, wharves, car ferries, yards and transfer tracks mentioned, whether consigned to or from points within or without the State of California, as well as those having points of origin and destination without that State. Of all the cars and movements mentioned herein, no discrimination is made as between cars owned by railroads operating within or exclusively without the State of California. The Belt moves all cars offered it by those industries, steamship companies, the four carrier roads [23] and those shippers using the transfer tracks mentioned. The Belt also moves between the Presidio and the steamship docks, car ferries, yards, and transfer tracks mentioned, cars originating

within and without the State of California and consigned to the Presidio or vice versa.

None of the tracks of The Belt are ever used by any of the other carrier roads except for the limited purpose of interchanging cars, and no locomotives, except those of The Belt, ever move over any part thereof. Neither the State of California nor The Belt owns any cars. Neither is it a party to any *thorough* rate for the transportation of cars or any shipment between point of origin and final destination, nor does The Belt move same on any through waybill. It simply charges a flat rate for moving a car between two points, the rate for a loaded car being a little higher than for an empty car. Such charges are uniform without any consideration as to point of origin or destination. The Belt also charges a flat rate, regardless of point of origin or destination, for the movement of baggage and Pullman cars, principally to and from the Presidio and points mentioned.

For inbound freight shipments, cars are moved to points on The Belt on so-called "switch lists" made out by the delivering carrier; these show the number and initials of each car, whether loaded or empty, and point of delivery or final destination on The Belt. The original waybill is retained by the carrier delivering the car to The Belt; this shows the point of origin, car number and initials, contents, consignee and ultimate destination on the line of The Belt and the through rate to such ultimate destination, including The Belt's switching charge which is absorbed and paid to The Belt

by the [24] carrier from whom the car is received. On outbound shipments, this "switch list" is made out by an agent of the carrier to whom the car is to be delivered by The Belt, and shows the number and initials of the car, whether loaded or empty, and the place where same is to be spotted. Concurrently with the making of such "switch list," this agent (first having received a shipping order from the consignor) makes out and delivers to said carrier a waybill for the movement of the car to its final destination, showing, in addition to other things heretofore mentioned, the consignor and point of origin and ultimate destination of the car. The car is then moved by a Belt crew on the "switch list", delivered to the carrier making out the through waybill and that carrier then continues the transportation of such car to its final destination on such waybill. The switching charge on outbound shipments is also absorbed and collected in the same manner as the switching charge on inbound shipments.

In some instances, where The Belt shifts or switches a car between two points on its line without delivery to any other carrier, it collects such switching charge from the industry or individual requesting such movement.

A large majority of the daily movements of The Belt for the year ending December 30, 1932, were carload shipments of freight, (a) originating in States other than California and destined to consignees on The Belt, or (b) originating on The Belt and destined to consignees in States other than

California. Many of the cars so hauled by The Belt during that year, both originated, and were consigned to points, in States other than California; and a considerable portion of the traffic so handled by the Belt, originated in, or was destined to foreign countries. [25]

The Board of State Harbor Commissioners (hereinafter called the Board) has no knowledge either as to the point of origin or final destination of any car handled by The Belt on the so-called switch list.

II.

The Belt is managed by the Board which for a number of years has consisted of P. W. Meherin, J. J. Tynan and Jos. A. Moore; they are officers of the State of California, appointed by the Governor, confirmed by the Senate of the State, and hold office at the pleasure of the Governor. All the properties administered by the Board, including The Belt, are owned by the State of California. All revenues received for services rendered by The Belt are paid to such Board; and pursuant to the laws of the State of California all monies collected by that Board shall be paid into the State Treasury at least once each month and be credited to the San Francisco Harbor Improvement Fund.

The Belt is not an incorporated company or a distinct agency of the State; its name was simply adopted by the Board to designate it as one of the many diversified instrumentalities of the Board and used in connection with the Board's powers.

III.

The Belt is operated by the State of California for the purpose of facilitating the commerce of the Port of San Francisco without any profit being derived therefrom; the charges made for the services rendered by it are fixed by the Board pursuant to the authority conferred upon it by Section 2524 of the Political Code of California, which authorizes said Board to collect such amount of revenue as will enable it to [26] perform the duties required of it by authority of Article IX of said Code; and Section 2526 of said Code expressly limits the amount of money to be collected by such charges to a sum sufficient to meet the operating expenses of said harbor.

IV.

The operation of The Belt is considered necessary by the State of California in the interest of and for the benefit of its people in the promotion and facilitation of commerce through the Port of San Francisco, and is operated solely for that purpose.

V.

For about forty-two years The Belt has been operated, and still is operated, under the immediate supervision of various superintendents; and during the year 1932 was operated under the immediate supervision of A. R. Pidgeon, Superintendent. The various superintendents of The Belt are appointed by the Board, are under its general supervision and control, and hold office at the pleasure of such Board. All inspectors, engineers and yardmen em-

ployed in the operation of The Belt are civil service employees, except in cases of emergency employment; said employees, in order to qualify as Civil Service employees, must pass an examination for their respective positions. All superintendents, inspectors, engineers and yardmen and other employees engaged in the operation of the State Belt Railroad are employes and servants of the State of California.

VI.

On February 20, 1932, The Belt hauled over its line in San Francisco Western Pacific box car No. 16113; this movement, consisting of a number of cars, was from The Belt's Beal Street Yard to the tracks on the north side of Pier 30, where [27] the Western Pacific and other cars were spotted alongside the steamship "Sierra" for unloading; the Western Pacific Car No. 16113 was loaded with sacked rice at East Briggs, California, and was consigned to Paia, Hawaiian Islands. During this movement, the coupling and uncoupling apparatus on the "A" end of said Western Pacific car was out of repair and inoperative as alleged in the complaint filed herein, thus necessitating a man or men going between the "A" end of said car and adjoining car to couple or uncouple them.

The Belt maintains no repair shops and the carriers delivering cars to The Belt maintain no repair shops in their yards at which cars are delivered to or received from, The Belt. The defects in this car could have been repaired in a few minutes and it was not necessary that same should be sent to

any so-called repair shop for that purpose. No employee of The Belt discovered the defects mentioned, and The Belt has no record of when the car was repaired, or whether it was later repaired, either before or after being delivered to one of the other carriers mentioned.

The Board did not as a Board, nor did any member thereof, personally, participate in, or have personal knowledge of, the movement of such car in its defective condition; and if any violation of the Federal Safety Appliance Act occurred, it was without the personal knowledge of the Board, or any member thereof, or of the State of California, and was without the consent of, but contrary to general instructions issued by the Board.

VII.

All of the facts herein stipulated (except as otherwise expressly stated) were true at all times during the year [28] 1932, and at all times mentioned in the complaint herein.

VIII.

Neither the sum prayed for in the complaint herein nor any part thereof has been paid to plaintiff or to any one for its use.

IX.

The practice of The Belt in carrying on its business has been as above described for many years.

X.

Attached hereto and marked Exhibit "A" and made a part of this Stipulation is a map showing the tracks of The Belt and its various connections referred to herein.

XI.

IT IS FURTHER STIPULATED AND AGREED that the constitutional provisions and statutes of the State of California may be judicially noticed by the Court and considered as part of this stipulation.

H. H. McPIKE
United States Attorney
LUCAS E. KILKENNY
Ass't United States Attorney
M. C. LIST
Special Ass't United States Attorney
Attorneys for Plaintiff.
U. S. WEBB
Attorney General of the State of California
RALPH O. MARRON
Deputy Attorney General
WILLIAM T. SWEIGERT
Attorneys for Defendant.

AND BE IT FURTHER REMEMBERED that the above entitled [29] cause came on regularly for trial before the above entitled court sitting with-

out a jury, a jury having been waived in writing by both parties, on June 6, 1933, Honorable A. F. St. Sure, United States District Judge, presiding, H. H. McPike, United States Attorney, Lucas E. Kilkenny, Assistant United States Attorney, and M. C. List, Special Assistant United States Attorney, appearing as attorneys for plaintiff, and U. S. Webb, Attorney General of the State of California, Ralph O. Marron, Deputy Attorney General, and William T. Sweigert appearing as attorneys for defendant, whereupon the following proceedings were had:

Said cause was argued before said court upon the stipulation of facts theretofore filed in said court, and at the conclusion of the argument a motion was made on behalf of plaintiff for judgment in its favor, and a motion was made and filed in said court by the defendant, State of California, for judgment of the court in favor of said defendant and against the plaintiff, United States of America; that said motion of said defendant was in words as follows, to wit:

[Title of Court and Cause.]

MOTION FOR JUDGMENT.

The above entitled cause having been submitted to the court for decision on the stipulation of facts and on briefs to be filed with the court, the defendant STATE OF CALIFORNIA now moves the above entitled court for judgment in said cause in favor of the defendant STATE OF CALIFORNIA

and against the plaintiff UNITED STATES OF AMERICA.

U. S. Webb
Attorney General of the
State of California.
RALPH O. MARRON
Deputy Attorney General.
WILLIAM SWEIGERT
Attorneys for Defendant. [30]

That said cause was submitted to the court for decision on said stipulation of facts, and on said motions, and on briefs to be filed; that thereafter and after the filing of briefs by the parties, and on October 4, 1933, said cause was regularly submitted to said court for its decision;

AND BE IT FURTHER REMEMBERED that thereafter the said court on to wit the 16th day of January, 1934, ordered that judgment be entered for plaintiff, to which ruling and order of the court, the defendant, The State of California, duly excepted, and hereby designates as

DEFENDANT'S EXCEPTION No. 1.

AND BE IT FURTHER REMEMBERED that thereafter and pursuant to said last mentioned order of said court, to wit, on the 16th day of January, 1934, judgment was entered in favor of plaintiff and against defendant, The State of California, to which judgment said defendant duly excepted on the grounds that said judgment is contrary to the law and to the facts stipulated by the parties to said

action at the trial, and is not sustained by the facts so stipulated, and hereby designates as

DEFENDANT'S EXCEPTION No. 2.

Now within the time allowed by law and the stipulation of the parties to said action and the order of the above entitled court, defendant, The State of California, presents the foregoing as its proposed Bill of Exceptions in the above entitled action and prays that the same may be settled and allowed.

Dated: February 24, 1934.

U. S. Webb
Attorney General of the State of California.
RALPH O. MARRON
Deputy Attorney General of the State of California.
WILLIAM T. SWEIGERT
Attorneys for defendant, State of California. [31]

STIPULATION FOR ALLOWANCE OF BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED AND AGREED that the foregoing bill of exceptions was presented by defendant, The State of California, within the time allowed by law therefor and that the same is a true and correct copy of the proceedings had at the trial of the above entitled action,

and that the same may be certified, allowed and settled, as provided by law and the practice of said court, by Honorable A. F. St. Sure, United States District Judge, who presided at the trial of said cause.

Dated: March 10th, 1934.

H. H. McPIKE
United States Attorney
MORRIS B. CLARK
Ass't United States Attorney
M. C. LIST
Special Ass't United States Attorney
Attorneys for Plaintiff.
U. S. WEBB
Attorney General of the State of California
RALPH O. MARRON
Deputy Attorney General of the State of California
WILLIAM T. SWEIGERT
Attorneys for Defendant

ORDER SETTLING AND ALLOWING BILL OF EXCEPTIONS.

I, the undersigned, Judge of the District Court of the United States, do hereby certify that the foregoing bill of exceptions, having been presented within the time allowed by law therefor, is a true and correct copy of the proceedings had at the trial of said action, and do hereby settle and allow the same and order that said bill of exceptions be filed with the Clerk of this court.

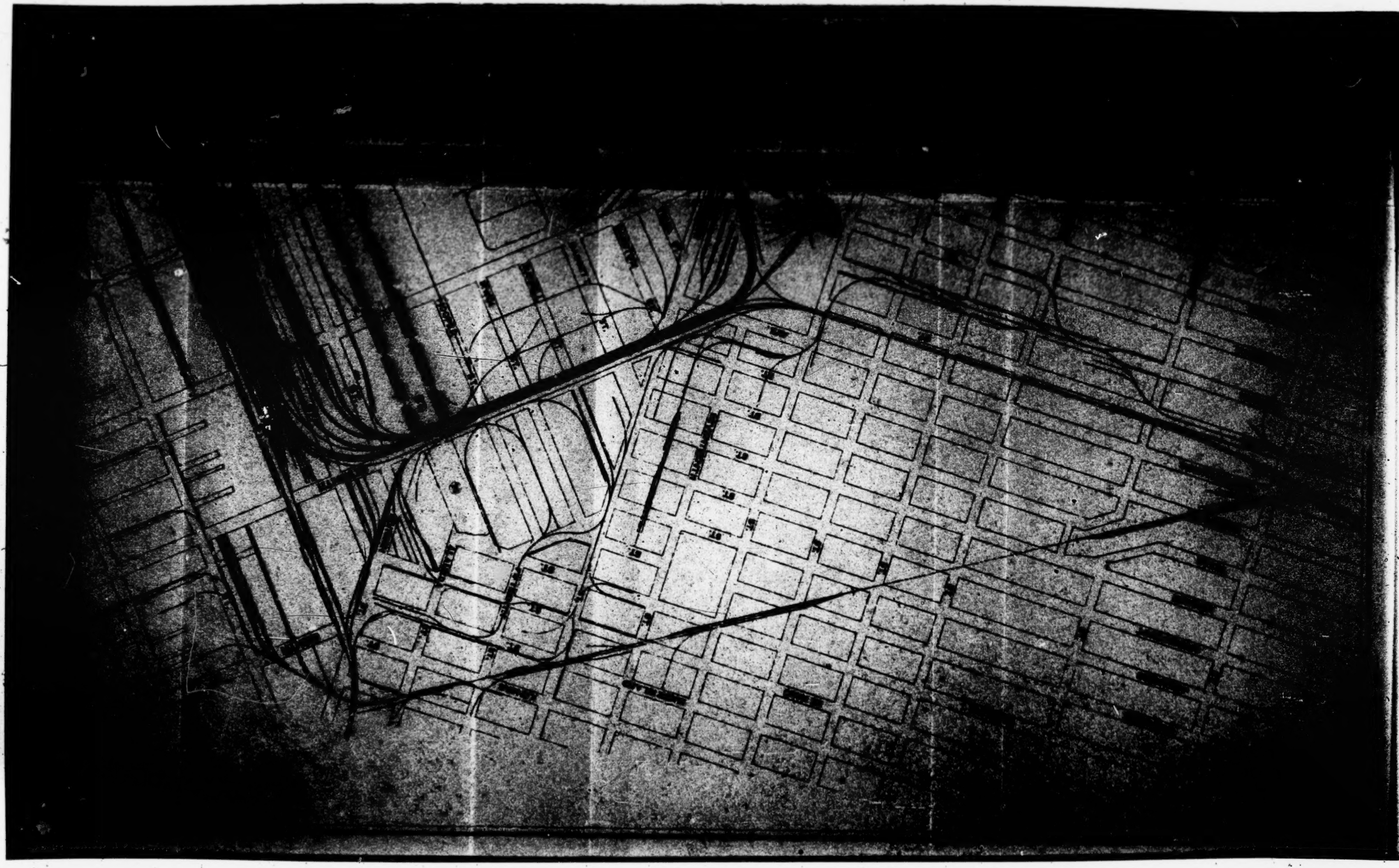
Dated: March 14, 1934.

A. F. ST. SURE
United States District Judge.

[Endorsed]: Service of the within Proposed Bill of Exceptions of Defendant, State of California admitted this 26th day of February, 1934.

H. H. McPIKE
United States Attorney.
MORRIS C. CLARK
Assistant United States Attorney.
M. C. LIST
Spec. Asst. U. S. Atty.

Filed Mar. 16, 1934. [32]



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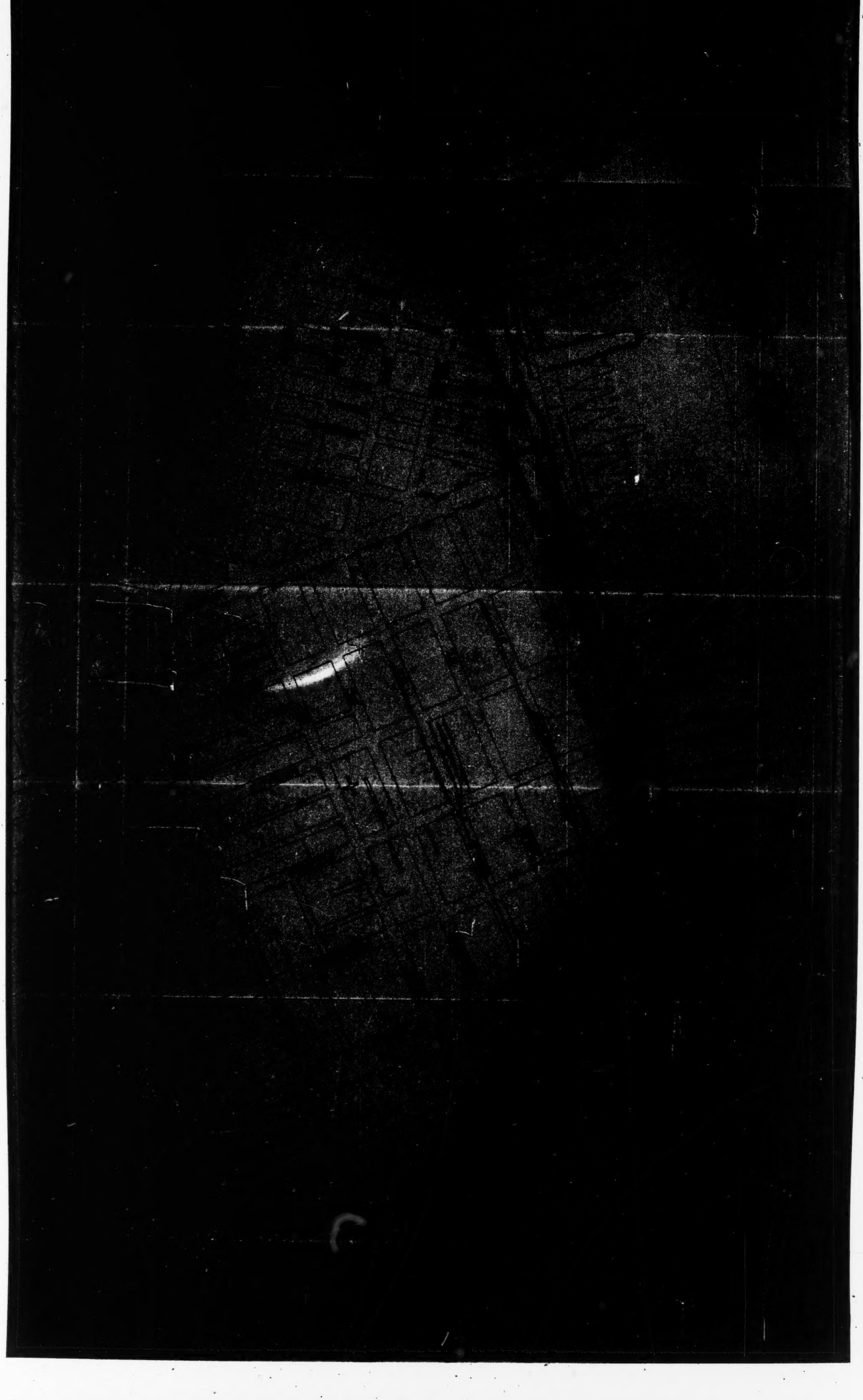

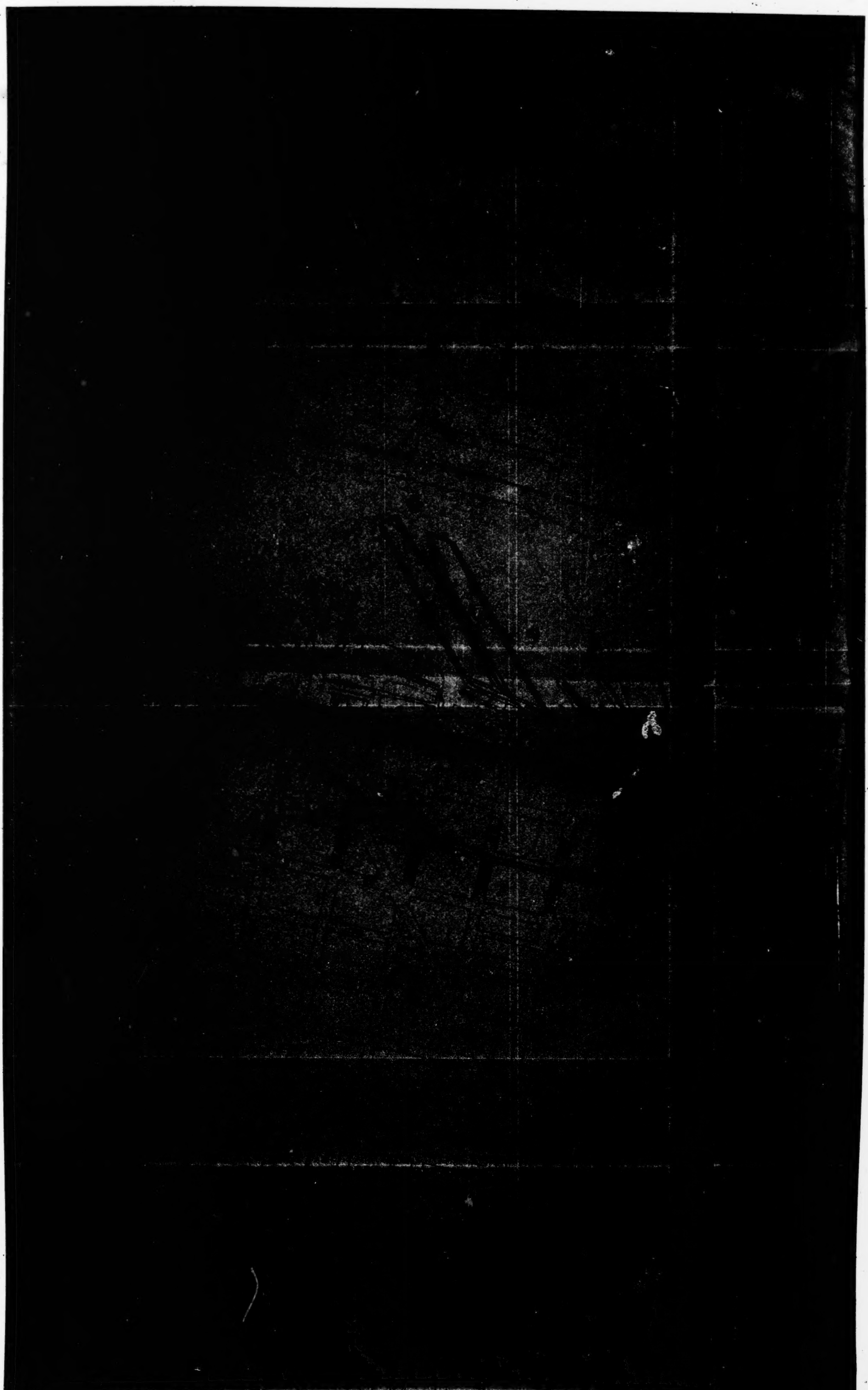

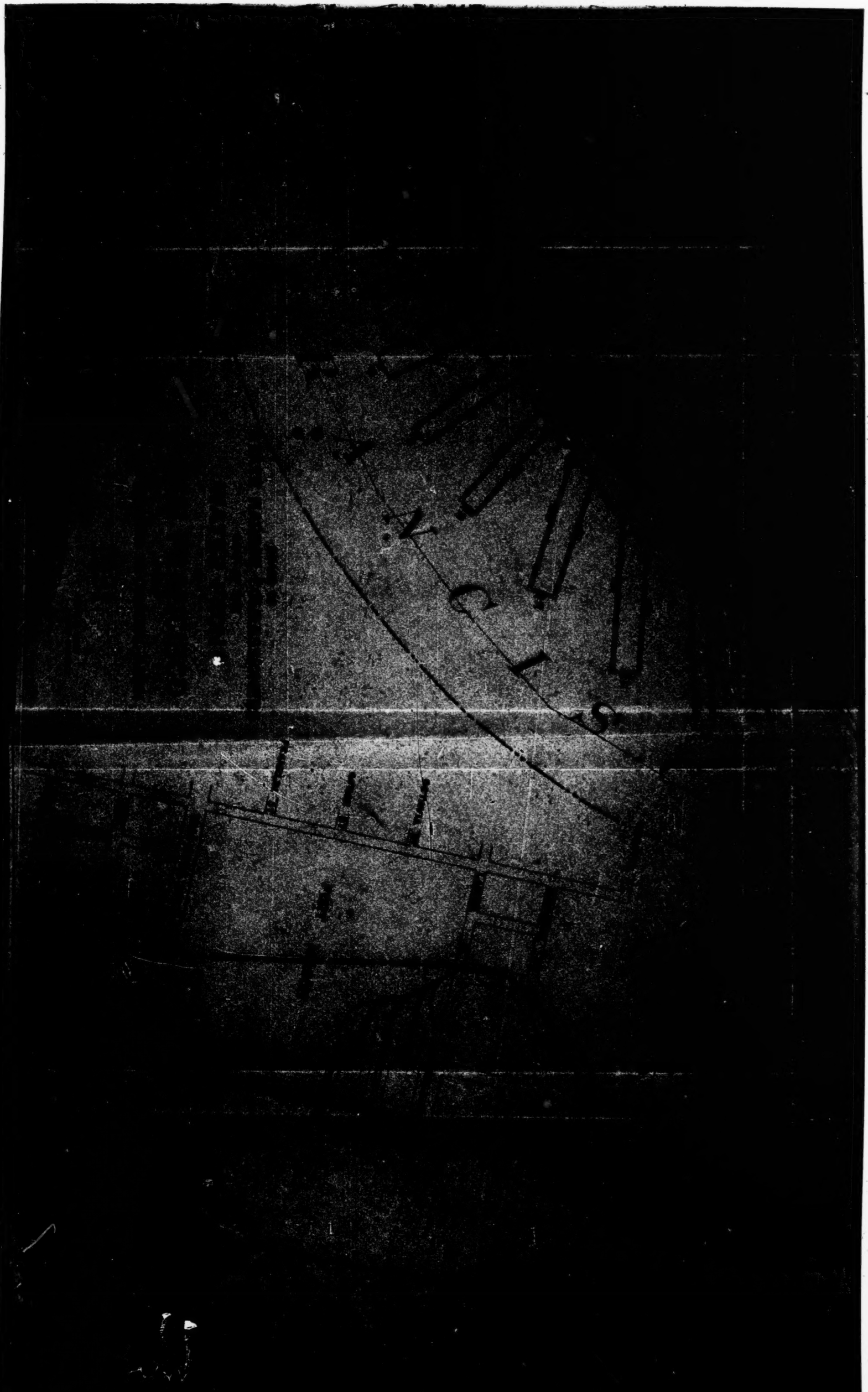

[Title of Court and Cause.]

PETITION FOR APPEAL.

The State of California, defendant in the above entitled action, feeling itself aggrieved by the rulings of the Court and the final judgment given, made and entered in said action on January 16, 1934, by which said judgment it was ordered, adjudged and decreed that plaintiff, The United States of America, do have and recover of and from defendant, The State of California, the sum of One Hundred ($100.00) Dollars together with costs of suit, for the reasons specified in the Assignment of Errors herewith presented and filed by said defendant, hereby appeals from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and said defendant prays for an order of this Court allowing said defendant's appeal to the United States Circuit Court of Appeals for the Ninth Circuit, that citation be issued as provided by law, that a transcript of the record, papers and proceedings in said action, upon which said judgment was made, duly authenticated, [33] may be sent to said United States Circuit Court of Appeals for the Ninth Circuit, and that an order be made by this Court fixing the amount of the security which the said defendant shall furnish upon said appeal, and that all further proceedings be suspended, stayed and superseded until the determination of said appeal by said United States Cir-

cuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray, etc.

Dated: March 10, 1934.

U. S. WEBB
Attorney General of the State of California.
RALPH O. MARRON
Deputy Attorney General.
WILLIAM T. SWEIGERT
Attorneys for Defendant, The State of California.

[Endorsed]: Filed Mar 10 1934 [34]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the State of California, defendant herein, and in connection with and as part of its appeal herein, makes and files the following Assignment of Errors upon which it will rely in prosecuting its appeal herein, and which it avers intervened and were committed during the trial of the above entitled cause, and in overruling defendant's demurrer herein, and in giving and entering judgment against this defendant and in favor of plaintiff, to defendant's prejudice, to wit:

I.

That the said United States District Court erred in overruling defendant's demurrer to plaintiff's complaint herein for the following reasons:

(a) That plaintiff's complaint herein does not state facts sufficient to constitute a cause of action against said defendant, the State of California.

(b) That the United States District Court had no jurisdiction over said defendant in that said defendant at all [35] times mentioned in the complaint was operating the State Belt Railroad in the performance of a governmental function of the State of California.

(c) That the United States District Court has no jurisdiction of an action against the State of California; such jurisdiction being original in the Supreme Court of the United States.

II.

That said Court erred in refusing to enter judgment herein for defendant and against plaintiff, as requested by defendant at the close of the trial, in the following particulars:

(a) Said District Court has no jurisdiction over an action against the State of California, such jurisdiction being original in the Supreme Court of the United States under the Constitution and laws of the United States.

(b) The United States of America has no authority to impose a fine or penalty upon the State of California.

III.

That the said Court erred in rendering and entering judgment in favor of plaintiff and against defendant in the following particulars:

(a) Said District Court has no jurisdiction over an action against the State of California, such jurisdiction being original in the Supreme Court of the United States under the Constitution and laws of the United States.

(b) The United States of America has no authority to impose a fine or penalty upon the State of California.

IV.

That said Court erred in adjudging that it had juris- [36] diction over an action against the State of California, acting as the operator of the State Belt Railroad, such jurisdiction being original in the Supreme Court of the United States.

V.

That said Court erred in giving judgment in favor of plaintiff and against defendant herein in that in so doing, it imposed a fine or penalty upon the State of California for acts occurring in the regular performance of a governmental function of the State of California.

VI.

That said Court erred in rendering and entering judgment in favor of plaintiff and against defendant herein in that the evidence was and is insufficient to justify the said judgment of said Court.

VII.

That said Court erred in rendering and entering judgment for plaintiff and against defendant in

said action in that said judgment is contrary to the law and the facts.

WHEREFORE, said defendant prays that said judgment of the United States District Court for the Northern District of California, Southern Division, dated January 16, 1934, be reversed, and that said District Court be ordered to enter judgment in favor of defendant, the State of California, and for such other and further relief as may be proper in the premises.

Dated: March 10, 1934.

U. S. WEBB
Attorney General of the State of California.
RALPH O. MARRON
Deputy Attorney General.
WILLIAM T. SWEIGERT
Attorneys for Defendant, The State of California.

[Endorsed]: Filed Mar 10 1934 [37]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND FIXING AMOUNT OF BOND ON APPEAL.

The defendant, The State of California, in the above entitled cause having prayed for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the proceedings and judgment made and entered herein by the

United States District Court for the Northern District of California, Southern Division, on the 16th day of January, 1934, and from each and every part thereof, and having presented and filed its Petition for Appeal, Assignment of Errors, and Prayer for Reversal pursuant to the statutes and rules in such case made and provided:

Upon motion of U. S. Webb, Attorney General of the State of California, Ralph O. Marron, Deputy Attorney General, and William T. Sweigert, attorneys for said defendant,

IT IS ORDERED that the appeal of said defendant to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment made and entered in the above entitled [38] action on January 16, 1934, be and the same is hereby allowed, and that the Clerk of this Court prepare and certify a Transcript of Record, papers, proceedings and judgment in this cause and transmit the same to the United States Circuit Court of Appeals for the Ninth Circuit, and

IT IS FURTHER ORDERED that the bond on said appeal be and hereby is fixed in the sum of $400, conditioned as required by law to cover damages, judgment and costs, and that said bond on appeal shall operate as and constitute a supersedeas bond.

Dated: March 10, 1934.

A. F. ST. SURE
United States District Judge.

[Endorsed]: Filed Mar 10 1934 [39]

[Title of Court and Cause.]

UNDERTAKING ON APPEAL.

Know all men by these presents:

That AMERICAN BONDING COMPANY OF BALTIMORE, a corporation duly organized and existing under and by virtue of the State of Maryland, and duly licensed to transact business in the State of California, is firmly bound unto The United States of America, plaintiff in the above entitled cause, in the sum of Four Hundred and No/100 Dollars, to be paid unto the said The United States of America, for which payment well and truly to be made, AMERICAN BONDING COMPANY OF BALTIMORE binds itself, its successors and assigns firmly by these presents.

Signed, sealed and dated this 12 day of March, 1934.

The condition of the above obligation is such that whereas the said The State of California, defendant in the above entitled cause, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of the above [40] entitled Court entered in said cause on the 16th day of January, 1934.

Now, therefore, the condition of the above obligation is such that if the said The State of California shall prosecute its said appeal to effect and answer all damages and costs if it fail to make its plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

It is further stipulated as a part of the foregoing bond that in case of the breach of any condition thereof, the above named District Court may, upon notice to said surety of not less than ten days, proceed summarily in the above entitled action to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against said surety and award execution therefor.

AMERICAN BONDING COMPANY
OF BALTIMORE
By WALTER JARDINE
Attorney in Fact.

This bond approved as to form, amount and sufficiency of surety.

Dated: March 13, 1934.

A. F. ST. SURE
United States District Judge. [41]

State of California,
City and County of San Francisco—ss.

On this 12 day of March in the year one thousand nine hundred and thirty-four, before me, H. I. Stratton a Notary Public in and for the City and County of San Francisco, personally appeared Walter Jardine known to me to be the person whose name he subscribed to the within instrument as the Attorney-in-Fact of the American Bonding Company of Baltimore, and acknowledged to me that he subscribed the name of the American Bond-

ing Company of Baltimore thereto as principal, and his own name at Attorney-in-Fact.

[Seal] H. I. STRATTON

Notary Public in and for the City and County of San Francisco, State of Calif.

[Endorsed] Filed Mar 14 1934 [42]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL.

To the Clerk of the above-entitled Court:

Please prepare and certify papers filed and proceedings had in the above entitled proceedings as are necessary to a determination of defendant's appeal herein, and include therein the following papers and documents:

1. Complaint and Summons with return,
2. Special Appearance and Demurrer of defendant, The State of California,
3. Order Overruling Demurrer,
4. Answer to Complaint,
5. Waiver of Jury and Stipulation of Facts,
6. Defendant's Motion for Judgment,
7. Order for Judgment, and denying defendant's Motion for Judgment,
8. Judgment,
9. Stipulation and Order Extending Time to File Bill of Exceptions to February 23, 1934, [43]
10. Stipulation and Order Extending Time to Prepare Bill of Exceptions and Term until March 24,1934,
11. Exceptions of Defendant to Order denying

defendant's Motion for Judgment and to Judgment and Order allowing same,

12. Bill of Exceptions,

13. Petition for Appeal,

14. Assignment of Errors,

15. Order Allowing Appeal and Fixing Amount of Bond on Appeal,

16. Citation on Appeal with admission of service,

17. Undertaking on Appeal,

18. Clerk's Certificate,

19. This Praecipe.

Dated: March 10, 1934.

U. S. WEBB
Attorney General of the State of California.
RALPH O. MARRON
Deputy Attorney General.
WILLIAM T. SWEIGERT
Attorneys for Defendant, The State of California.

[Endorsed]: Service and receipt of a copy of the within Praecipe is hereby admitted this 10th day of March, 1934.

H. H. McPike
United States Att'y for No. Dist. of Calif.
MORRIS R. CLARK
Assistant United States Attorney
M. C. LIST
Special Ass't. to the United States att'y.

[Title of Court and Cause.]

STIPULATION RE AMENDMENT OF PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL AND RE CERTIFYING OF WAIVER OF JURY AND STIPULATION OF FACTS

WHEREAS the Praecipe for Transcript of Record on Appeal filed in the above entitled Court by defendant, The State of California, requested the Clerk of said Court to include among the papers to be certified by him as Item 5 of said Praecipe, a document entitled "Waiver of Jury and Stipulation of Facts", and as Item 12 of said Praecipe, a document entitled "Bill of Exceptions", and

WHEREAS the said Bill of Exceptions contains in full the document entitled "Waiver of Jury and Stipulation of Facts", and the printing of both of said documents would entail needless repetition and expense;

NOW, THEREFORE, it is hereby stipulated by plaintiff and defendant that said Praecipe be and is hereby amended by striking out said Item 5 thereof; and

It is further stipulated that said document specified in said Item 5 of said Praecipe need not be certified by the Clerk of this Court, and that the "Waiver of Jury and Stipulation of Facts" contained in the Bill of Exceptions (Item 12 of said Praecipe) shall constitute such Waiver of Jury and Stipulation of Facts for all purposes of defendant's appeal in said action; and

It is further stipulated that this stipulation be included in said Transcript of Record on Appeal, and be properly certified by the Clerk of the above entitled Court.

Dated: March 20, 1934. [45]

H. H. McPIKE
United States Attorney
MORRIS R. CLARK
Assistant United States Attorney
M. C. LIST
Special Assistant United States Attorney
Attorneys for Plaintiff and Appellee.

U. S. WEBB
Attorney General of the State of California
RALPH O. MARRON
Deputy Attorney General
WILLIAM T. SWEIGERT
Attorneys for Defendant and Appellant.

[Endorsed]: Due service of the within Stipulation Re: Amendment of Praecipe admitted this 20th day of March, 1934.

H. H. McPIKE
MORRIS R. CLARK
M. C. LIST
Attorneys for Plaintiff and Appellee.

Filed Mar 20 1934 [46]

[Title of Court.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, WALTER B. MALING, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 46 pages, numbered from 1 to 46, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case entitled THE UNITED STATES OF AMERICA vs. THE STATE OF CALIFORNIA No. 19246-S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of $8.70 and that the said amount has been paid to me by the Attorney for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 21st day of March A. D. 1934.

[Seal] WALTER B. MALING
Clerk.
J. P. Welsh,
Deputy Clerk. [47]

[Title of Court and Cause.]

CITATION ON APPEAL.

The United States of America—ss.

The President of the United States to The United States of America, and to H. H. McPike, United States Attorney for the Northern District of California, Morris R. Clark, Assistant United States Attorney, and M. C. List, Special Assistant to the United States Attorney, Attorneys for Plaintiff, Greeting:

YOU ARE HEREBY CITED and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal of record in the Clerk's office of the United States District Court for the Northern District of California, Southern Division, wherein The State of California is appellant and the United States of America is appellee, to show cause, if any there be, why the judgment rendered and entered against said appellant as in the said order [48] allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable A. F. ST. SURE, United States District Judge for the Northern District of California, Southern Division, this 10th day of March, 1934.

A. F. ST. SURE
United States District Judge. [49]

Service and receipt of a copy of the within Citation on Appeal and copies of Petition for Appeal, Assignment of Errors, and Order Allowing Appeal and Fixing Amount of Bond on Appeal is hereby admitted, this 10th day of March, 1934.

H. H. McPIKE
United States Att'y for
No. Dist of Calif.
MORRIS R. CLARK
Assistant United States
Attorney
M. C. LIST
Special Ass't to the
United States Att'y.
Attorneys for Plaintiff
and Appellee.

[Endorsed]: Filed Mar 10 1934.

[Endorsed]: No. 7436. United States Circuit Court of Appeals for the Ninth Circuit. The State of California, Appellant, vs. The United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed March 23, 1934.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 7436

THE STATE OF CALIFORNIA, APPELLANT

vs.

THE UNITED STATES OF AMERICA, APPELLEE

Upon appeal from the District Court of the United States for the Northern District of California, Southern Division

Proceedings had in the United States Circuit Court of Appeals for the Ninth Circuit

At a stated term, to wit, the October term, A. D. 1934, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court room thereof, in the city and county of San Francisco, in the State of California, on Tuesday the thirtieth day of October, in the year of our Lord one thousand nine hundred and thirty-four.

Present: The Honorable Curtis D. Wilbur, senior circuit judge, presiding; Honorable William H. Sawtelle, circuit judge; Honorable Francis A. Garrecht, circuit judge.

Order of submission

Ordered appeal in above cause argued by Mr. Ralph O. Marron, Deputy Attorney General, State of California, counsel for appellant, and by Mr. James O. Tolbert, special assistant United States attorney, counsel for appellee, and submitted to the court for consideration and decision.

At a stated term, to wit, the October term, A. D. 1934, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court room thereof, in the city and county of San Francisco, in the State of California, on Monday, the twenty-eighth day of January in the year of our Lord one thousand nine hundred and thirty-five.

Present: The Honorable Curtis D. Wilbur, senior circuit judge, presiding; Honorable Francis A. Garrecht, circuit judge, Honorable Charles C. Cavanah, district judge.

Order directing filing of opinion and filing and recording of judgment

By direction of the court, ordered that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion filed.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 7436

THE STATE OF CALIFORNIA, APPELLANT

vs.

THE UNITED STATES OF AMERICA, APPELLEE

Jan. 28, 1935

Upon appeal from the District Court of the United States for the Northern District of California, Southern Division

Before WILBUR and GARRECHT, Circuit Judges

WILBUR, *Circuit Judge:* This is a civil suit based upon the provisions of 45 U. S. C., §§ 1–16, commonly known as the Safety Appliance Acts. The case arose out of the operation of the State Belt Railroad, hereinafter referred to as the Belt Railroad, owned and operated by the State of California.

The cause was heard in the court below under a waiver of jury and on a stipulation of facts.

The Belt Railroad is about five miles in length. It receives from and delivers to common carriers engaged in interstate commerce railroad cars in interchange at San Francisco, switches cars to and from the wharves and industries there, and engages in the duties usually performed by terminal railroads.

On February 20, 1932, the Belt Railroad hauled over its line Western Pacific box car no. 16113. During the movement, the coupling and uncoupling apparatus on the "A" end of the car was out of repair and inoperative, as alleged in the appellee's complaint. thus necessitating that, in the language of the statute, men go between the ends of the cars in order to uncouple them.

The appellee contends that from the agreed statement of facts "there is no question but that the Safety Appliance Acts were violated had the Belt Railroad been privately owned and operated, and the question is whether by reason of its being owned and operated by the State of California any liability attaches to the State." In our view of the case, it is unnecessary for us to pass upon this contention.

It will be necessary for us to consider only one question, which, as phrased by the appellee, is as follows:

"Is the State of California suable in the District Court of the United States for a violation of the Safety Appliance Acts?"

In the court below, the appellant raised the question of jurisdiction by a "special appearance and demurrer", asserting that the District Court had no jurisdiction over the appellant, in that the controversy is one between the United States and a State and is there-

fore within the exclusive original jurisdiction of the Supreme Court of the United States.

The appellant's demurrer was overruled. The court below rendered judgment against the appellant and in favor of the appellee for $100 and costs.

In attacking the jurisdiction of the District Court, the appellant relies upon the provisions of 28 U. S. C. A., § 341, which in part reads as follows:

"The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction."

This section is to be read in connection with article III, § ii, clause 2, of the Constitution, which is in part as follows:

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction."

Section 341 was first enacted by Congress as a part of section 13 of the Judiciary Act of 1789 (1 Stat. 73, 80–81). It was reenacted in its present form as section 687 of the Revised Statutes of 1873–1874, which section appears in the second edition of that compilation, published in 1878, at page 127.

On March 3, 1911, the same provision was again reenacted, without change, as section 233 of the Judicial Code. 36 Stat., pt. 1, 1156.

Finally, it was included in the United States Code of 1926, and there has been no change in its text since that time.

The appellee contends that this provision giving exclusive jurisdiction to the Supreme Court was repealed in part by the Safety Appliance Act, which was enacted in 1893 (27 Stat. 531, 532), amended in 1896 (29 Stat. 85), and again in 1903 (32 Stat., pt. 1, 943–944), and again in 1910 (36 Stat., pt. 1, 299). These enactments, it will be observed, all antedate the enactment of the Judicial Code in 1911, which vested in the Supreme Court exclusive jurisdiction of all actions in which a State is a party, with certain exceptions not involved here. It is clear, of course, that the latest enactment controls in case of a conflict between two enactments.

The appellee contends that section 13 of the Judiciary Act of 1789, as amended and revised (*supra*), giving exclusive jurisdiction to the Supreme Court, was repealed in part by the following jurisdictional provision, enacted in 1893, in the Safety Appliance Act:

"Any common carrier engaged in interstate commerce by railroad using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the preceding provisions of this chapter, shall be liable to a penalty of $100 for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; * * *"

Assuming that this section does repeal by implication those provisions of the then existing law giving exclusive jurisdiction to the Supreme Court (*supra*) where a State is a party, because inconsistent therewith, it is clear that the subsequent reenactment in 1911 (36 Stat. 1156) of the original act without change would for the same reason repeal the intermediate statutes of 1893 and 1896 (27 Stat. 531 and 29 Stat. 85), that is, because the earlier statute is inconsistent therewith.

In the foregoing discussion, we have assumed, for the sake of argument, that the Safety Appliance Acts of 1893 and 1896 by implication repealed the section of the Judiciary Act of 1789, giving exclusive jurisdiction to the Supreme Court over actions in which the State is a party.

A study of the statutes involved, however, discloses that no such implied repeal of the Judiciary Act was intended by Congress.

In the first place, it should be observed that the doctrine of supersession, or repeal by implication, is not favored by the courts. The very passage in Lewis' Sutherland Statutory Construction (2d ed.), vol. 1, § 247, pp. 464–465, cited by the appellee in support of its argument on this point, contains the statements that "The intention to repeal . . . will not be presumed, nor the effect of repeal admitted, unless the inconsistency is unavoidable, and only to the extent of the repugnance"; that "'The law does not favor a repeal of an older statute by a later one by mere implication'"; and that "Repeals by implication are not favored."

In *Great Northern Railway Co.* v. *United States* (C. C. A. 8), 155 F. 945, 960–961, affirmed, 208 U. S. 452, Judge Devanter, now a member of the Supreme Court, said:

". . . to establish a supersession or repeal of a statute by implication, it is not sufficient to show merely that a later statute, making no mention of the particular subject of the first, employs language broad enough to cover some part or all of it; for, as words are sometimes employed with less than their largest literal meaning, it must also appear that the two statutes cannot stand together, reasonable purpose and operation being accorded to each. [Many cases cited.] Or, as the same thing is at times differently expressed, a statute couched in clear and explicit terms is not overthrown by possible, but not necessary, implications flowing from after legislation."

See also *Gay* v. *Ruff*, 292 U. S. 25, 37; and *Knapp* v. *Byram*, 21 F. (2d) 226, 227.

Particularly is this true when the doctrine of implied repeal is invoked against the sovereign state.

In *United States* v. *Clausen* (D. C. Wash.), 291 F. 231, 238, transferred to the Supreme Court, by this court, 293 F. 195, writ of error dismissed, 266 U. S. 641, the District Court said:

"Under its war powers, Congress doubtless could confer upon a District Court authority to coerce a sovereign state and its officers, but that it so intended is not lightly to be concluded in the absence of positive and express congressional enactment, particularly so in view

of the provisions of section 233 of the Judicial Code (section 1210, Comp. Stats.) (28 U. S. C. A. 341, *supra*), which provides [here the court quoted the provision transcribed above]:

"This statute is controlling of this question, despite the fact that the present suit may not be purely a controversy of a civil nature. The dignified treatment and consideration due a soverign state form no small part of the reason that has actuated the lawmaking powers in making a State subject alone to the jurisdiction of the Supreme Court. An implied repeal of the law conferring, so far as the courts of the United States are concerned, exclusive jurisdiction on the Supreme Court of suits against a State, is not to be sanctioned, in view of the long-established recognition of this principle in the history of the doctrine of State's rights."

See also *United States* v. *McIntosh*, 57 F. (2d) 573, 580.

Applying the foregoing principles to the statutes that we are now considering, we find various grounds for concluding that Congress intended no implied repeal of the Judiciary Act and the Revised Statutes, insofar as the exclusive jurisdiction of the Supreme Court is concerned, when the Safety Appliance Acts were passed.

In the first place, the last-named statutes apply in terms only to "any common carrier engaged in interstate commerce." The Supreme Court has already adjudicated that the operation of the Belt Railroad involved in the instant case has not caused the State of California to become a common carrier. In *Sherman* v. *United States*, 282 U. S. 25, 29, Mr. Justice Holmes said:

"California has not gone into business generally as a common carrier, but simply has constructed the Belt Line as an incident of its control of the harbor—a State prerogative."

Obviously, the Safety Appliance Acts, which vest jurisdiction in the District Courts and which are made specifically applicable to common carriers, cannot be construed—as to a State that has been held not to be a common carrier—as repealing prior statutes giving the Supreme Court exclusive jurisdiction over controversies where the State is a party.

In an effort to escape from the effect of the *Sherman case*, *supra*, on the question of "State prerogative", the appellee seeks to distinguish between "State prerogative" and "State soverignty." As we read the authorities, the distinction is without a difference as far as the question now before us is concerned. *Aetna Co.* v. *Bramwell*, 12 F. (2d) 307, 309; *Words and Phrases* (1st ed.) vol. 6, p. 5518; *Bouvier* (3d Rev.) vol. 3, p. 2670.

Furthermore, there is abundant authority for the proposition that a statute should not be construed to apply against the sovereign unless the enactment refers to the soverign in specific terms.

In *Savings Bank* v. *United States*, 86 U. S. 227, 239, the court said:

"It is a familiar principle that the King is not bound by any act of Parliament unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him in the least, if they may tend to restrain or diminish any of his rights

and interests. He may even take the benefit of any particular act, though not named. The rule thus settled respecting the British Crown is equally applicable to this government, and it has been applied frequently in the different States, and practically in the Federal courts. It may be considered as settled that so much of the royal prerogatives as belonged to the King in his capacity of *parens patriae*, or universal trustee, enters as much into our political state as it does into the principles of the British constitution."

See also, *United States* v. *Herron*, 87 U. S. 251, 257, 263; *Guarantee Co.* v. *Title Guaranty Co.*, 224 U. S. 152, 155; *In re Fowble*, 213 F. 676, 679–680; *Villere* v. *United States* (C. C. A. 5), 18 F. (2d) 409, certiorari denied, 275 U. S. 532; *Wechsler* v. *United States* (C. C. A. 3), 27 F. (2d) 850, 851.

The appellee seeks to escape the application of the foregoing doctrine by contending that "The principle that a sovereign is not brought within the terms of a statute unless named therein applies only to the enacting sovereign."

We cannot agree with this view. In *United States* v. *Hoar*, 26 Fed. Cas. 329, 330, No. 15,373, Mr. Justice Story had before him the sole question of "whether the United States are barred of their suit by the statutes of limitations of Massachusetts." The learned jurist there said:

"Now, I think, it may be laid down as a safe proposition, that no statute of limitations has been held to apply to actions brought by the crown, unless there has been an express provision including it. For it is said, that, where a statute is general, and thereby any prerogative, right, title, or interest is divested or taken from the king, in such case the king shall not be bound, unless the statute is made by express words to extend to him.

* * * * * * *

"But independently of any doctrine founded on the notion of prerogative, the same construction of statutes of this sort ought to prevail, founded upon the legislative intention. Where the Government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed, or the language used, that the Government itself was in contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different, and often contrary force to the Government itself. It appears to me, therefore, to be a safe rule founded in the principles of the common law, that the general words of a statute ought not to include the Government, or affect its rights, unless that construction be clear and indisputable upon the text of the act."

The greater part of the second paragraph of the foregoing excerpt was quoted with approval by Mr. Chief Justice Fuller in *Stanley* v. *Schwalby*, 147 U. S. 508, 515.

Again, in *New York* v. *Irving Trust Co.*, 288 U. S. 329, 331, the Supreme Court, having before it § 57 (n) of the Bankruptcy Act, said:

"It is admitted here, that as the United States and the States are not mentioned in the limitation of § 57, they are not bound thereby."

The final question to be determined is whether the suit before us is of "a civil nature."

We need not dwell on this point, since the appellee admits that "this is a civil suit", and the repeated decisions of the Supreme Court and other Federal courts leave the matter beyond a peradventure of a doubt.

In *C., B. & Q. Ry.* v. *United States*, 220 U. S. 559, 577–578, the Supreme Court had before it the same statutes that we are here considering. In that case, Mr. Justice Harlan said:

"In effect, the contention is that the present action for a penalty is a criminal prosecution, and that the defendant cannot be held guilty of a crime when it had no thought or purpose to commit a crime, and endeavored with due diligence to obey the act of Congress. This contention is unsound, because the present action is a civil one. It is settled law that 'a certain sum, or a sum which can readily be reduced to a certainty, prescribed in a statute as a penalty for the violation of law, may be recovered by civil action, even if it may also be recovered in a proceeding which is technically criminal'."

See also, *United States* v. *Regan*, 232 U. S. 37, 48; *United States* v. *C., B. & Q. R. R.*, 237 U. S. 410, 411, 413; *United States* v. *Louisville & Nashville R. Co.* (C. C. A. 6) 167 F. 306, 308; *United States* v. *Illinois Cent. R. Co.* (C. C. A. 6) 170 F. 542, 544–545; *United States* v. *Atlantic Coast Line R. Co.*, 182 F. 284, 285; *United States* v. *Minneapolis, St. P. & S. S. M. Ry. Co.*, 235 F. 951, 952–3.

Accordingly, we hold that the court below erred in overruling the demurrer filed by the appellant, and in assuming jurisdiction of the cause.

Judgment reversed, and the District Court is directed to dismiss the action.

(Endorsed): Opinion. Filed Jan. 28, 1935. Paul P. O'Brien, clerk.

United States Circuit Court of Appeals for the Ninth Circuit

No. 7436

THE STATE OF CALIFORNIA, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Upon appeal from the District Court of the United States for the Northern District of California, Southern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern

District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and hereby is, reversed, with directions to said District Court to dismiss the action.

(Endorsed:) Judgment. Filed and entered January 28, 1935. Paul P. O'Brien, clerk.

Certificate of clerk U. S. Circuit Court of Appeals for the Ninth Circuit to record certified under rule 38 of the revised rules of the Supreme Court of the United States

I, Paul P. O'Brien, as clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty-one (61) pages, numbered from and including 1 to and including 61 to be a full, true, and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of Honorable Stanley Reed, Solicitor General of the United States, of counsel for the appellant, and certified under rule 38 of the revised rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this 18th day of April A. D. 1935.

[SEAL] PAUL P. O'BRIEN, *Clerk.*

U. S. GOVERNMENT PRINTING OFFICE: 1935

Supreme Court of the United States

Order allowing certiorari

Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

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No. [redacted] 33

In the Supreme Court of the United States

OCTOBER TERM, 1934

THE UNITED STATES, PETITIONER

v.

THE STATE OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. —

THE UNITED STATES, PETITIONER

v.

THE STATE OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, entered in the above case on January 28, 1935, reversing the judgment of the United States District Court for the Northern District of California.

OPINION BELOW

The opinion of the Circuit Court of Appeals is reported in 75 F. (2d) 41.

JURISDICTION

The judgment sought to be reviewed was entered on January 28, 1935. The jurisdiction of this

Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the State of California in the operation of the state owned State Belt Road is a common carrier and therefore subject to the so-called Federal Safety Appliance Act of March 2, 1893, as amended by the Acts of April 1, 1896 and March 2, 1903. (U. S. C., Title 45, Secs. 1–10.)

2. Whether the United States District Court below had jurisdiction of the present suit to collect from the State the penalty prescribed for violation of said Safety Appliance Act.

STATUTES INVOLVED

The statutes involved will be found in the Appendix, *infra,* pp. 10–11.

STATEMENT

The Government's complaint charged the State of California as a common carrier engaged in interstate commerce with violating the provisions of the Safety Appliance Act in that it hauled over its line of railroad a car out of repair because the uncoupling lever was disconnected from the lock lift of the coupler, thus necessitating a man going between the ends of cars to couple or uncouple said cars (R. 2 et seq.). The State entered a special appearance and demurrer claiming that this Court had exclusive jurisdiction of the suit (R. 6). The

demurrer was overruled (R. 7), and the State filed an answer setting up, in substance, that in operating the railroad it was "performing a governmental function" (R. 7–12). The case was thereupon submitted to the court upon the Government's motion for judgment on a stipulation of facts (R. 14). Motion for judgment was thereafter granted (R. 14–15).

The stipulated facts disclose that the State Belt Railroad, owned by the State of California, is located wholly within the City and County of San Francisco, California, and is approximately five miles in length; that it has a physical connection with one railroad and connects by freight-car ferries with three other railroads, all engaged in interstate commerce (R. 21); that it serves 175 industries, and 45 wharves, car ferries, and freight yards in the movement of loaded and empty cars; that it moves all carload freight as well as empty cars in the area mentioned whether such cars be consigned to or without the State of California; that it moves all cars offered to it by the industries, steamship companies, four common-carrier roads, and other shippers, whether said cars originate within or without the State (R. 22); that it charges a flat rate per car for the service it renders (R. 23); that during the year 1932 a large majority of the carload shipments of freight handled were moved in interstate commerce (R. 24–25); that the Belt Railroad is operated without profit, for the benefit of the people of California, and to promote and facilitate

commerce through the Port of San Francisco (R. 26); that on February 20, 1932, it moved a car loaded with rice destined for Hawaii, which car had its car coupling and uncoupling apparatus so out of repair as to require a man to go between the ends of the cars to effect such coupling and uncoupling (R. 27).

On appeal the judgment of the District Court was reversed, the Circuit Court of Appeals holding, in substance, that in operating the railroad the State was performing a governmental function and, furthermore, that this Court had exclusive jurisdiction of the suit to collect the penalty here involved.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Ninth Circuit erred:

1. In holding that the State was not subject to the Safety Appliance Act.

2. In holding that this Court has exclusive jurisdiction of a suit to collect from a State a penalty for violation of the Safety Appliance Act.

3. In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. The questions presented are plainly of general importance, and their authoritative determination by this Court seems essential for future guidance in cases involving state operation of railroads.

2. Under the decision of the court below, the only remedy open for enforcement of penalties against a State operating a common carrier in interstate commerce for violations of the Safety Appliance Act is by original proceeding in this Court. Whether the statutes vest exclusive original jurisdiction in this Court to entertain actions of this character for the recovery of small penalties, in which, it has been assumed heretofore, the defendant is entitled to a jury trial as of right, is an important question of Federal law which has not been, but should be, settled by this Court.

3. The decision of the court below holding that the State of California was not amenable to suit in the District Court for violation of the Safety Appliance Act appears to be contrary to the decisions of this Court in what are deemed to be analogous cases.

The court below has interpreted this Court's decision in *Sherman* v. *United States,* 282 U. S. 25, as having already adjudicated that the operation of the Belt Railroad involved in this case has not caused the State of California to become a common carrier. In that case this Court clearly did not determine that the State was not a common carrier subject to the provisions of the Safety Appliance Act, saying at page 30:

> 'Manifestly if we are right in what we have said the judgment is wrong and we are relieved from the duty of considering whether

the Safety Appliance Act should be construed to embrace the State.

Contrary to the ruling of the court below, the record facts plainly establish common carrier activities by the State in interstate commerce within the reach of the Safety Appliance Act. In an earlier case, in 1924, the court below held that the same Belt Railroad involved in this case was a common carrier engaged in interstate commerce. *McCallum* v. *United States,* 298 Fed. 373, 375, certiorari denied, 266 U. S. 606. Cf. *United States* v. *Brooklyn Eastern District Terminal,* 249 U. S. 296; *United States* v. *Union Stock Yard,* 226 U. S. 286; *United States* v. *Atlanta Terminal Co.,* 260 Fed. 779, certiorari denied, 251 U. S. 559; *Mathewes* v. *Port Utilities Commission,* 32 F. (2d) 913 (S. C.).

The operation of the railroad here involved was not a governmental activity on the part of the State, although it may have been undertaken for the public good and without profit. *Helvering* v. *Powers,* 293 U. S. 214.

In any event, the operation by the State of the railroad in interstate commerce was subject to regulation by the Federal Government. *Board of Trustees* v. *United States,* 289 U. S. 48. In that case this Court held that the commerce power is exclusive and plenary and that its exercise may not be limited, qualified, or impeded to any extent by state action.

Pursuant to this power to regulate commerce, Congress adopted the Safety Appliance Act, *infra,*

p. 10. That Act, among other things, provides that "any common carrier engaged in interstate commerce by railroad" shall be liable to a penalty of $100 for each violation of certain provisions of the Act, to be recovered in a suit "to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed." The purpose of the Act was to promote the safety of employees and travelers upon railroads. The evident intent of Congress was that the Act should cover all common carriers engaged in interstate commerce by railroad. Employees and travelers upon state owned and operated railroads are entitled to the protection of safety measures equally with employees and travelers upon railroads not operated by States. The State of California, as has been shown, was a common carrier within the meaning of the Act, and as such was subject to the provisions of the Act.

The court below has held that a suit against the State for collection of the penalty prescribed in the Act may be brought only in this Court. In this respect we submit that the court below has erred. The reasonable construction of the Act is that Congress intended that suits for enforcement of penalties against States operating common carriers in interstate commerce should be brought in the District Courts in the same manner as suits against other common carriers. In a suit brought

against it under the Act, a State would doubtless be entitled to a jury trial. Jury trials in the District Courts are the usual thing; in this Court, the unusual. The amounts involved in these suits are small. Violations occur frequently. They may take place in regions remote from Washington. There the witnesses necessary to sustain or defend the suit are to be found. There the defendant is. In this case the railroad violating the Act is in San Francisco. It cannot be reasonably assumed that Congress intended to impose upon States which might operate common carriers the duty of sending counsel and witnesses to Washington to defend before this Court an original suit for the recovery of a penalty of $100. Nor can it be assumed that Congress intended to have this Court bear the burden of trying cases of this character. But most certainly Congress did intend the Act to apply to all common carriers in interstate commerce by railroad, a state-operated railroad as well as a privately operated road.

If it be clear, and we submit it is, that Congress intended to vest in the District Courts jurisdiction of suits against States which operate common carriers within the meaning of the Safety Appliance Act, then that Act impliedly repeals so much of the earlier Judiciary Act granting exclusive jurisdiction to this Court as is inconsistent with the later Act. *United States* v. *Tynen,* 11 Wall. 88, 92; *United States* v. *Yuginovich,* 256 U. S. 450, 463.

The court below in this connection stated that, assuming this repeal by implication did take place, the "reenactment" in 1911 in the Judicial Code and in 1926 in the United States Code of the provision of the original Judiciary Act operated by the same token to repeal the provision of the Safety Appliance Act. It is submitted that the court below mistakenly considered the inclusion in the codes of the provision of the original Judiciary Act as reenactments of that provision. The codes themselves provide that they shall not have that effect. Judicial Code, Sec. 294; U. S. C., page 1. See *Smiley* v. *Holm,* 285 U. S. 355, 373.

The vesting by Congress in the lower Federal courts of jurisdiction of that class of cases in which this Court has original jurisdiction meets with no constitutional objection. *Bors* v. *Preston,* 111 U. S. 252; *Ames* v. *Kansas,* 111 U. S. 449.

Wherefore it is respectfully submitted that this petition should be granted.

STANLEY REED,
Solicitor General.

APRIL 1935.

APPENDIX

Section 2 of the Safety Appliance Act of March 2, 1893, c. 196, 27 Stat. 531 (U. S. C., Title 45, Sec. 2), provides:

> It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

Section 6 of the Act, as amended April 1, 1896, c. 87, 29 Stat. 85 (U. S. C., Title 45, Sec. 6) provides:

> Any common carrier engaged in interstate commerce by railroad using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the preceding provisions of this chapter, shall be liable to a penalty of $100 for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; * * *.

Section 233 of the Judicial Code (U. S. C., Title 28, Sec. 341) provides:

> The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1935

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No. 33

In the Supreme Court of the United States

OCTOBER TERM, 1935.

THE UNITED STATES, PETITIONER

v.

THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 33

THE UNITED STATES, PETITIONER

v.

THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

No opinion was rendered by the United States District Court for the Northern District of California. The opinion of the Circuit Court of Appeals (R. 51–56) is reported in 75 F. (2d) 41.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 28, 1935. (R. 56–57.) The petition for a writ of certiorari was filed April 27, 1935 and was granted October 14, 1935. (R.

58.) The jurisdiction of this Court rests on Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1935.

QUESTIONS PRESENTED

1. Whether the State of California in the operation of the state-owned State Belt Railroad is a common carrier engaged in interstate commerce by railroad.

2. Whether, if the State is such common carrier, it is subject to the provisions of the Federal Safety Appliance Act.

3. Whether the United States District Court had jurisdiction of the present suit to collect from the State the penalty prescribed for violation of the Act.

STATUTES INVOLVED

Section 2 of the Safety Appliance Act of March 2, 1893, c. 196, 27 Stat. 531 (U. S. C., Title 45, Sec. 2), provides:

> It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

By Section 1 of the Act of March 2, 1903, c. 976, 32 Stat. 943 (U. S. C., Title 45, Sec. 8), this pro-

vision, *inter alia* is made "to apply to all * * * cars, * * * used on any railroad engaged in interstate commerce."

Section 6 of the Act, as amended April 1, 1896, c. 87, 29 Stat. 85 (U. S. C., Title 45, Sec. 6) provides:

> Any common carrier engaged in interstate commerce by railroad using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the preceding provisions of this chapter, shall be liable to a penalty of $100 for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; * * *.

Section 233 of the Judicial Code (U. S. C., Title 28, Sec. 341) provides:

> The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction. * * *

STATEMENT

On May 25, 1932, the United States filed a complaint in the United States District Court for the Northern District of California against the State of California to recover the statutory penalty of $100 for a violation of the Federal Safety Appliance Act. (R. 2–4.) The complaint alleged that the State in the operation of the state owned State Belt Railroad was a common carrier engaged in interstate commerce by railroad and charged that it had committed a violation of the Act in hauling over said road a car upon one end of which the coupling and uncoupling apparatus was out of repair in such wise as to necessitate a man or men going between the ends of cars to couple or uncouple them. (R. 2–4.) The State entered a special appearance and demurrer asserting that this Court had exclusive jurisdiction of the controversy. (R. 6.) The demurrer was overruled (R. 7) and the State answered (R. 7–12).

A jury trial having been waived, the case was tried on stipulated facts. (R. 20–29.) Judgment was entered for the United States for $100, being the statutory penalty for a violation of the Act. (R. 15–16.)

The stipulated facts include the following:

The State Belt Railroad, owned by the State of California, is located wholly within the City of San Francisco, and is about five miles in length. (R. 21, 25.) It has physical connection with the tracks of the Southern Pacific Company, and its tracks

also run onto wharves owned by the State and used by freight car ferries of the Southern Pacific Company, the Atchison, Topeka & Santa Fe Railway Company, the Western Pacific Railway Company and the Northwest Pacific Railway Company, all common carriers in interstate commerce by railroad. (R. 21.) It also connects with, does all the switching in, and hauls all cars entering and leaving certain adjacent freight yards of these four carriers, owned by the State and used by the carriers under agreement. (R. 21.) Its tracks also run onto about forty-five state-owned wharves on which freight is loaded from steamers. (R. 21.) Its tracks also connect, at various points along its line, with approximately one hundred and seventy-five industries. (R. 21–22.)

None of the tracks of the Belt Railroad is used by the carriers mentioned except for interchanging cars and only its own locomotives move over any part of its tracks. (R. 23.) The State owns no cars. (R. 23.)

All of the industries, wharves, car ferries, and freight yards above-mentioned are served exclusively by the Belt Railroad in the movement of loaded and empty cars. (R. 22.) It also moves carload freight and empty cars from and onto Southern Pacific transfer tracks owned and operated by the Southern Pacific for the use of shippers or consignees who do not own industrial or private tracks, such movement being for the limited purpose of interchanging cars under an agree-

ment conferring trackage rights over such tracks upon the Belt Railroad. (R. 22.)

The Belt Railroad moves all carload freight and empty cars between the industries, wharves, car ferries, freight yards, and transfer tracks mentioned, whether consigned to or from points within or without the State, including those having both destination and origin without the State. (R. 22.) No distinction is made between cars owned by railroads operating within or exclusively without the State. (R. 22.) It moves all cars offered to it by the industries, the steamship companies, the carriers, and the shippers using the transfer tracks. (R. 22.) It moves between the Presidio and the steamship docks, car ferries, freight yards, and transfer tracks cars originating both within and without the State and consigned to or from the Presidio. (R. 22–23.)

The Belt Railroad is not a party to any through rate for the transportation of any shipment nor does it move shipments on through waybills. (R. 23.) It charges a flat rate regardless of point of origin or destination for moving cars between two points, its rate for a loaded car being a little higher than that for an empty car. (R. 23.)

On inbound freight shipments cars are moved to points on the Belt Railroad on so-called "switch lists" which are made out by the delivering carrier and which show the number and initials of each car, whether loaded or empty, and the point of de-

livery or final destination on the Belt Railroad. (R. 23.) The carrier delivering the car retains the original waybill, which shows the point of origin, car number and initials, contents, consignee and ultimate destination on the line of the Belt Railroad, and the through rate to such ultimate destination. (R. 23.) The through rate includes the Belt Railroad switching charge which is absorbed by the carrier and paid by it to the Belt Railroad. (R. 23–24.) On outbound shipments the "switch list" is made up by an agent of the carrier to which the Belt Railroad is to deliver the car and shows the number and initials of the car, whether loaded or empty, and the place where it is to be spotted. (R. 24.) Concurrently, the agent, having first received a shipping order from the consignor, makes out and delivers to the carrier a waybill for the movement of the car to ultimate destination showing, in addition to the things heretofore mentioned, the consignor, point of origin, and ultimate destination of the car. (R. 24.) The car is then moved on the "switch list" by the Belt Railroad and is delivered to the carrier which continues the transportation to the final destination named in the waybill. (R. 24.) The switching charge on outbound shipments is absorbed and collected in the same manner as that on inbound shipments. (R. 24.) If a car is moved between two points on the line of the Belt Railroad without delivery to any carrier the Belt Railroad collects the switching

charge from the individual or industry requesting such movement. (R. 24.)

A large majority of the daily movements over the Belt Railroad for the year 1932 were carload shipments of freight either originating in states other than California and destined to consignees on the Belt Railroad or originating on the Belt Railroad and destined to consignees in states other than California. (R. 24–25.) Many of the cars so hauled by the Belt Railroad during that year both originated in and were consigned to points in states other than California. (R. 25.) A considerable portion of the traffic so handled by it originated in, or was destined to, foreign countries. (R. 25.)

The Belt Railroad is operated by the Board of State Harbor Commissioners who are appointive state officers. (R. 25.) It is operated under the immediate supervision of a superintendent who is appointed by the Board, is under its supervision and control, and holds office at its pleasure. (R. 26). All inspectors, engineers, and yardmen employed in operating the Belt Railroad, except in cases of emergency employment, are civil service employees of the State. (R. 26–27.)

The Belt Railroad is operated by the State of California for the sole purpose of facilitating, for the benefit of its people, the commerce of the port of San Francisco without any profit being derived therefrom, and its operation is considered necessary by the State for such purpose. (R. 26.) The charges made for its services are fixed by the Board

pursuant to authority conferred by Section 2524 of the Political Code of California which authorizes the Board to collect such an amount of revenue as will enable it to perform the duties required of it by Article IX of the Code. (R. 26.) The Code limits the amount of such charges to a sum sufficient to meet the operating expenses of the harbor. (R. 26.) All revenue received for the services rendered by the Belt Railroad are paid to the Board which under the laws of the State must pay the same at least once a month into the State Treasury to be credited to the San Francisco Harbor Improvement Fund. (R. 25.) The Belt Railroad is not an incorporated company or a distinct agency of the State, but is a name adopted by the Board to designate it as one of the many diversified instrumentalities of the Board. (R. 25.)

On February 20, 1932, the Belt Railroad in a movement consisting of a number of cars, hauled over its line Western Pacific Car No. 16113 loaded at a point in California with freight consigned to Hawaii upon which car the coupling and uncoupling apparatus was out of repair as alleged in the complaint. (R. 27.) The Belt Railroad maintains no repair shops. (R. 27.) The defects in this car could have been repaired in a few minutes without the necessity of sending it to any repair shop. (R. 27–28.) Neither the Board nor any member thereof had personal knowledge of the defective condition. (R. 28.)

On appeal the Circuit Court of Appeals reversed the judgment of the District Court. (R. 56–57.) The Circuit Court of Appeals expressly limited its consideration to the question of jurisdiction of the District Court (R. 51) holding that this Court had exclusive jurisdiction of the controversy and that consequently the District Court erred in overruling the demurrer (R. 56). In the course of determining this issue, however, the Circuit Court of Appeals stated that the State in its operation of the State Belt Railroad was not a common carrier and was not subject to the Safety Appliance Act. (R. 54–56.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Ninth Circuit erred:

1. In holding that the State was not subject to the Safety Appliance Act.

2. In holding that this Court has exclusive jurisdiction of a suit to collect from a State a penalty for violation of the Safety Appliance Act.

3. In reversing the judgment of the District Court.

SUMMARY OF ARGUMENT

I. The Safety Appliance Act applies to "any common carrier engaged in interstate commerce by railroad." The State of California, in the operation of the State Belt Railroad, is such a common carrier. It performs the usual functions of a terminal railroad, accepting and transporting all car-

load freight moving to or from the many industrial plants located along its line and originating on or destined to the lines of connecting interstate railroads and steamship companies. It also acts as a link in the through shipment of freight carried in interstate and foreign commerce by such railroads and steamship companies. It holds itself ready to move all freight offered, and a large part of the freight transported by it has its origin or destination (or both) in States other than California. The fact that it does not issue through bills of lading or that it receives payment for its services from the carriers on a per car basis does not prevent it from being a common carrier engaged in interstate commerce.

II. The State of California in its operation, as a common carrier, of the State Belt Railroad is subject to the provisions of the Safety Appliance Act. That Act applies broadly to *any* common carrier. The power of the Federal Government to regulate state-owned railroads engaged in interstate commerce would seem beyond doubt. Activities of that character constitute a departure by the State "from usual governmental functions" and are not immune from Federal taxation. *Helvering* v. *Powers,* 293 U. S. 214, 225. *A fortiori* they are not immune from the Federal commerce power. There is no rational basis for reading an exception into this statute in favor of state-owned railroads. When a State engages in activities which constitute

it a common carrier by railroad in interstate commerce it falls within the reach of the Safety Appliance Act. *Ohio* v. *Helvering*, 292 U. S. 360, 371.

III. The District Court had jurisdiction under section 6 of the Safety Appliance Act of this suit to recover from the State of California the penalty prescribed for violation of the Act. Congress has the power under the Constitution to vest the lower Federal courts with jurisdiction of suits by the United States against a State. *Ames* v. *Kansas*, 111 U. S. 449. It would seem clear that Congress intended by section 6 to make the District Courts the forum for all suits under the Safety Appliance Act. To the extent that such suits may involve States, section 6, being the later statute, impliedly repealed the provision of the Judiciary Act (now Section 233 of the Judicial Code) vesting, with some exceptions inapplicable here, exclusive jurisdiction in this Court of suits in which a State is a party. If considerations of policy are resorted to in determining whether Congress intended by section 6 of the Safety Appliance Act to vest the District Court with jurisdiction of this suit, it is submitted that the weightier considerations support the view that Congress did so intend.

ARGUMENT

I

THE STATE OF CALIFORNIA IN THE OPERATION OF THE STATE-OWNED STATE BELT RAILROAD IS A COMMON CARRIER ENGAGED IN INTERSTATE COMMERCE BY RAILROAD

This Court has stated that whether a transportation agency is a common carrier "does not depend upon whether its charter declares it to be a common carrier, nor upon whether the State of incorporation considers it to be such; but upon what it does." *United States* v. *Brooklyn Terminal*, 249 U. S. 296, 304. Manifestly, the issue as to whether a railroad is a common carrier is in no way affected by the fact that it is owned by a state which may not deem it to be a common carrier, or is not operated under a charter which declares it to be such, or, as here, is not operated under any charter at all.

Viewed in the light of "what it does", there seems little doubt that the activities of the State Belt Railroad are such as to constitute it a common carrier by railroad. It runs along the waterfront of the San Francisco harbor, connecting with approximately 175 industrial plants. It runs onto wharves where connection is made by freight car ferries with four railroads engaged in interstate commerce. It connects with the freight yards used by these railroads. It runs onto some 45 state-owned wharves used by steamship companies. It

moves all cars offered it by the railroads, the steamship companies, and the industrial plants. It transports all carload freight and empty cars between the industries, wharves, car ferries, and freight yards, whether destined to points within or without the state, or whether originating within or without the state, including shipments consigned both to and from points outside the state. These industries, wharves, car ferries and freight yards are served exclusively by the State Belt Railroad. A large majority of its traffic has its origin or destination (or both) in states other than California, and a considerable portion originates in, or is destined to, foreign countries. (*Supra*, pp. 4–8.)

The functions which the State Belt Railroad performs, as between the industrial plants along its line, on the one hand, and the four railroads and steamship lines on the other, is that of a terminal railroad. It also constitutes a link in the through transportation of freight carried by the railroads and steamship companies. That its duties are those usually performed by terminal roads was recognized by the court below, which stated (R. 51):

> It receives from and delivers to common carriers engaged in interstate commerce railroad cars in interchange at San Francisco, switches cars to and from the wharves and industries there, and engages in the duties usually performed by terminal railroads.

The services performed by the State Belt Railroad are not substantially different from those of

the Brooklyn Terminal, which this Court held in *United States* v. *Brooklyn Terminal, supra,* to be a common carrier engaged in interstate commerce by railroad within the meaning of the Hours of Service Act. In that case it appeared that the Brooklyn Terminal operated a freight station under contracts with ten interstate railroads and several steamship companies, transporting freight by car floats from the railroad termini to its Brooklyn docks and thence by locomotive for a distance of a mile or less to freight houses or team tracks for unloading, and also receiving freight from shippers in Brooklyn, consigned to points on such railroads and similarly transporting the same by locomotive and car floats to the railroad termini. In that case, as here, the terminal railroad owned none of the cars which it transported and it was paid for its services not by the shipper or consignee, but by the railroad or steamship company for whose account it performed the transportation service.

This Court stated (pp. 304–306):

> The relation of the Terminal to the several railroads is substantially the same as that of the terminal considered in *United States* v. *Baltimore & Ohio R. R. Co.,* 225 U. S. 306; 231 U. S. 274, 288. The transportation performed by the railroads begins and ends at the Terminal. Its docks and warehouses are public freight stations of the railroads. These with its car floats, even if not under common ownership or manage-

ment, are used as an integral part of each railroad line, like the stockyards in *United States* v. *Union Stock Yard Co.*, 226 U. S. 286, and the wharfage facilities in *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498. They are clearly unlike private plant facilities. Compare *Tap Line Cases*, 234 U. S. 1, 25. The services rendered by the Terminal are public in their nature; and of a kind ordinarily performed by a common carrier.

* * * * * *

One who transports property from place to place over a definite route as agent for a common carrier may, under conceivable circumstances, be a private carrier. But what is there in the facts above recited to endow the Terminal with that character? The service which it performs is distinctly public in character;—that is, conveying between Brooklyn and points on any of the ten interstate carriers and their connections all property that is offered. The fact that the railroad of the Terminal is short does not prevent it from being a common carrier, *United States* v. *Sioux City Stock Yards Co.*, 162 Fed. Rep. 556; nor does the fact that the thing which it undertakes to carry is contained only in cars furnished by the railroad companies with which it has contracts. Railroads, whose only service is hauling cars for other railroads, have been held liable as common carriers under the Safety Appliance Acts, *Union Stockyards Co. of Omaha*

v. *United States,* 169 Fed. Rep. 404; *Belt Railway Co. of Chicago* v. *United States,* 168 Fed. Rep. 542; and under the Twenty-Eight Hour Law, *United States* v. *Sioux City Stock Yards Co., supra.*

While it is true that the Brooklyn Terminal, unlike the State Belt Railroad, issued through bills of lading, no reason appears why that fact should be deemed material. In *United States* v. *Union Stock Yard,* 226 U. S. 286, this Court held that a stockyards company and a junction railroad connecting the stockyards with interstate railroads, the stock of both being held in common ownership, were common carriers by railroad, although bills of lading were not issued by either company. And bills of lading were not issued by the railroads involved in *United States* v. *Sioux City Stock Yards Co.,* 162 Fed. 556 (C. C. N. D. Iowa); *Union Stockyards Co. of Omaha* v. *United States,* 169 Fed. 404 (C. C. A. 8th), and *Belt Railway Co. of Chicago* v. *United States,* 168 Fed. 542 (C. C. A. 7th). The functions performed by the roads involved in these three cases, which were cited by this Court in the *Brooklyn Terminal* case, *supra,* closely resemble those of the State Belt Railroad.

The fact that the State Belt Railroad receives payment for its services from the carriers on a per car basis affords no proper ground for distinguishing the *Brooklyn Terminal* case, *supra,* in which payment was "at the rate of 3 cents per 100 pounds of freight moving to or from points east of the

western termini of said railroads, and 4½ cents per 100 pounds on freight moving to or from points beyond such termini." (249 U. S. 296, 301–302.) In *Union Stockyards Co. of Omaha* v. *United States, supra,* (quoted by this Court in *United States* v. *Union Stock Yard,*[1] *supra,* p. 305) the stockyards company was held to be a common carrier engaged in interstate commerce by railroad within the Safety Appliance Act, although it moved only cars belonging to railroads with which it connected, did not issue any bills of lading, did not collect any charge for its services from shippers or consignees, did not participate in any through rate, but merely obtained from the railroads payment of fixed charges for its services on a car basis. See *Belt Railway Co. of Chicago* v. *United States, supra,* p. 544; *United States* v. *Sioux City Stock Yards Co., supra,* p. 558.

It would seem plain, therefore, that, although the functions of the State Belt Railroad, like those of the roads involved in the cases herein referred to, are of a special character, they are such as to constitute it a common carrier in interstate commerce by railroad. It holds itself ready to serve the many industrial plants located along its line and the interstate railroads and steamship companies with which it connects, and to serve as a link

[1] In this case, it appeared that the interstate railroads paid the junction company a fixed sum per car, except that compensation for moving less than carload freight was on a tonnage basis. (226 U. S. 286, 299–300.)

in the through transportation in interstate and foreign commerce of freight offered it by these railroads and steamship companies. In *United States v. Union Stock Yard, supra,* this Court stated (p. 305):

> They are common carriers because they are made such by the terms of their charters, hold themselves out as such and constantly act in that capacity, and because they are so treated by the great railroad systems which use them. In *Union Stock Yards Co. v. United States,* 169 Fed. Rep. 404, Mr. Justice Van Devanter (while a Circuit Judge), speaking for the Court of Appeals, said (406):
>
> "Its [the Stock Yards Company's] operations * * * include the maintenance and use of railroad tracks and locomotives, the employment of a corps of operatives in that connection, and the carriage for hire over its tracks of all livestock destined to or from the sheds or pens, which, in effect, are the depot of the railroad companies for the delivery and receipt of shipments of livestock at South Omaha. The carriage of these shipments from the transfer track to the sheds or pens and vice versa is no less a part of their transit between their points of origin and destination than is their carriage over any other portion of the route. True, there is a temporary stoppage of the loaded cars at the transfer track, but that is merely incidental, and does not break the continuity of the transit any more than does

> the usual transfer of such cars from one carrier to another at a connecting point. And it is of little significance that the stockyards company does not hold itself out as ready or willing generally to carry livestock for the public, for all the railroad companies at South Omaha do so hold themselves out, and it stands ready and willing to conduct and actually does conduct, for hire a part of the transportation of every livestock shipment which they accept for carriage to or from that point, including such shipments as are interstate."

And see *United States* v. *Atlanta Terminal Co.*, 260 Fed. 779 (C. C. A. 5th), certiorari denied 251 U. S. 559.

In *M'Callum* v. *United States*, 298 Fed. 373 (C. C. A. 9th), certiorari denied, 266 U. S. 606, the State Belt Railroad was held to be a common carrier in interstate commerce by railroad and this decision was followed in *Tilden* v. *United States*, 21 F. (2d) 967 (C. C. A. 9th). Nevertheless in the present case the court below has reached a different result, although in the court's opinion the road's duties are those "usually performed by terminal railroads" (R. 51). The court below apparently considered this Court's decision in *Sherman* v. *United States*, 282 U. S. 25, as having adjudicated that the State of California was not a common carrier by reason of its operation of the State Belt Railroad. But in that case this Court held only that the Board of State Harbor Commissioners

did not constitute a common carrier and reversed the judgment which the United States had obtained in a suit against the members of the Board. It was held that, as between the State and the members of the Board, who were only agents of the State, it was the State, and not the Board, which would constitute the carrier, but the Court expressly refrained from determining whether the State was a common carrier in interstate commerce by railroad within the Safety Appliance Act.

II

THE STATE OF CALIFORNIA IN ITS OPERATION, AS A COMMON CARRIER, OF THE STATE BELT RAILROAD IS SUBJECT TO THE PROVISIONS OF THE FEDERAL SAFETY APPLIANCE ACT

The stipulated facts clearly show a violation of section 2 of the Safety Appliance Act. The proviso in Section 4 of the Safety Appliance Act of April 14, 1910 (c. 160, 36 Stat. 299, U. S. C., Title 45, Sec. 13), permitting movements for the purpose of making repairs obviously does not apply because the movement here in question was not for such purpose, and the car could have been repaired in a few minutes without being moved to a repair-shop (R. 27). See *United States* v. *Erie R. R.*, 237 U. S. 402, 409. Nor is it material that neither the Board nor the State had knowledge of the defect, since the liability created is absolute. *St. Louis & Iron Mountain Ry.* v. *Taylor*, 210 U. S. 281, 294–296; *Chicago, B. & Q. R. Co.* v. *United States*, 220 U. S. 559; *Delk* v. *St. Louis & S. F. R. Co.*, 220 U. S. 580.

The Safety Appliance Act applies broadly to *any* common carrier engaged in interstate commerce by railroad. Unless, therefore, an exception is to be read into the statute where such a common carrier is owned by a state, California is subject to the provisions of the Act. And although the precise question here is as to the Safety Appliance Act, there is necessarily involved the question whether state-owned railroads are subject to the provisions of other Federal statutes regulating railroads and to the jurisdiction thereunder of the Interstate Commerce Commission. That the Commission regards this and other roads as subject to its jurisdiction though owned by a state is clear. *California Canneries Co.* v. *S. P. Co.*, 51 I. C. C. 500, 502–503; *United States* v. *Belt Line Railroad Co.*, 56 I. C. C. 121; *Texas State Railroad*, 34 I. C. C. Val. R. 276. This Court has not yet passed upon this question. See *United States* v. *N. Y. Cent. R. R.*, 272 U. S. 457, 461–462.

The power of the Federal Government to regulate state-owned railroads engaged in interstate commerce would seem beyond doubt. This conclusion follows *a fortiori* from the decisions of this Court rejecting the claim of immunity from the Federal taxing power made with respect to similar state enterprises. *Helvering* v. *Powers*, 293 U. S. 214 (operation of a street railway); *South Carolina* v. *United States*, 199 U. S. 437 (sale of liquor

under a dispensary system); *Ohio* v. *Helvering*, 292 U. S. 360 (sale of liquor through state owned stores). These cases hold that where a state engages "in businesses which constitute a departure from usual governmental functions and to which, by reason of their nature, the federal taxing power would normally extend", the state is not immune from Federal taxation. *Helvering* v. *Powers*, *supra*, p. 225. "The fact that the state has power to undertake such enterprises, and that they are undertaken for what the state conceives to be the public benefit, does not establish immunity" (*Ibid*). To hold otherwise would enable the States indirectly to cripple the Federal taxing power. *South Carolina* v. *United States*, *supra*, pp. 454–455.

In *Helvering* v. *Powers*, *supra*, this Court stated (p. 227):

> * * * If, in the instant case, the commonwealth had acquired the property of the company and had organized management of it in perpetuity by the state government, instead of temporarily, or had taken over all the street railways in all its cities for direct operation by the commonwealth, there would appear to be no ground, under the principles established by the decisions we have cited, for holding that this would effect the withdrawal of the enterprise from the federal taxing power.

And in *South Carolina* v. *United States*, *supra*, the Court, in discussing the consequences of sus-

taining the claim of immunity there made, referred to the possibility of state ownership of the entire railroad system (199 U. S. 437, 454).

In *Georgia* v. *Chattanooga,* 264 U. S. 472, 481, 482, the Court characterized the construction by Georgia of a railroad in Tennessee as a "private undertaking" with respect to which Georgia was in the same position as "a private corporation authorized to own and operate a railroad", and had "divested itself of its sovereign character." And see *United States* v. *Planters' Bank,* 9 Wheat. 904; *Bank of Kentucky* v. *Wister,* 2 Pet. 318, 323; *Curran* v. *Arkansas,* 15 How. 304, 308.

It is plain that a state-owned railroad would not be immune from the Federal taxing power. So far as the commerce power is concerned it is not clear that any immunity is properly to be implied in favor of the states, but assuming that such immunity exists, it is manifestly no more extensive than the immunity from Federal taxation. See *Board of Trustees* v. *United States,* 289 U. S. 48, 59. The considerations upon which the immunity would be denied in the one case apply equally to the other. The Constitution vests the power to regulate interstate commerce in the Federal Government, and in this field its power is supreme. A state could obviously not endow corporations with immunity from Federal commerce regulations such as those embodied in the Safety Appliance Act, nor could it pass laws dealing with the same subject.

matter. *Southern Ry. Co.* v. *R. R. Comm. Indiana,* 236 U. S. 439; *Gilvary* v. *Cuyahoga Valley Ry.,* 292 U. S. 57, 60–61. It is equally obvious that it cannot by itself undertaking the operation of railroads engaged in interstate commerce nullify the power of the Federal Government to regulate such railroads. A contrary view would logically result in the automatic loss of control by the Federal Government over all activities in interstate commerce which the states see fit to undertake.

Since, therefore, the Federal Government clearly has the power to regulate state-owned railroads engaged in interstate commerce, no sound reason appears for excepting them from the operation of existing Federal statutes. The language of the Safety Appliance Act affords no basis for such an exception for it embraces *any* common carrier. Appellee relies upon the rule that a sovereign is not bound by a statute unless specifically named. *Guarantee Co.* v. *Title Guaranty Co.,* 224 U. S. 152; *United States* v. *Herron,* 20 Wall. 251; *In re Fowble,* 213 Fed. 676 (Md.). Each of these cases involved the application of a statute against the enacting sovereign. This rule has its historical basis in the English practice by which the Crown is held to be unaffected by Acts of Parliament not specifically directed against it. *United States* v. *Herron, supra,* p. 255; *Savings Bank* v. *United States,* 19 Wall. 227, 239. The historical basis for this rule of statutory construction clearly indi-

cates that it has application only to the enacting sovereign.[2]

Even if this rule may be deemed applicable by analogy to sovereigns other than the enacting sovereign, there is plainly no basis for its application in the present case, where a state, engaged in a private undertaking, claims to be excepted from a Federal statute regulating all such undertakings under the commerce power delegated by the states under the Constitution to the Federal Government. The state by undertaking the operation of the railroad has to that extent divested itself of sovereignty and has in that respect placed itself in the same position as private individuals or corporations engaged in such enterprise. There is no basis for assuming that Congress intended to distinguish between state and privately owned railroads. Clearly the safety of the employees and of the property transported is equally imperiled, and the progress of interstate traffic is equally impeded, whether defective appliances are used on a state owned or privately owned highway of interstate commerce. See *Southern Ry. Co.* v. *United States,*

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[2] In *New York* v. *Irving Trust Co.*, 288 U. S. 329, upon which the court below relied (R. 56) the question as to whether this rule of construction is applicable to a different sovereign was apparently not in issue, for the Court stated (p. 331):

"It is admitted here, that as the United States and the States are not mentioned in the limitation of § 57, they are not bound thereby."

222 U. S. 20, 27. And see *Mathewes* v. *Port Utilities Commission,* 32 F. (2d) 913 (E. D. So. Car.).[3]

In *Ohio* v. *Helvering, supra,* the Federal statute imposed a tax upon every person dealing in intoxicating liquors, and person was defined to include a corporation. The statute did not explicitly include states. The Court held that "the state itself, when it becomes a dealer in intoxicating liquors, falls within the reach of the tax either as a 'person' under the statutory extension of that word to include a corporation, or as a 'person' without regard to such extension" (292 U. S. 360, 371). So here, where a state engages in the operation of a railroad, as a common carrier, it falls within the reach of the Safety Appliance Act, the provisions of which are expressly made applicable to *any* common carrier in interstate commerce by railroad.

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[3] In this case it was held that a railroad operated by a municipality was subject to the Federal Employers' Liability Act. The court stated (p. 915):

"The language of the act is broad. It says: 'Every common carrier by railroad while engaged in commerce, etc.' (45 USCA § 51). Every reason which could be urged upon Congress for the passage of this act in reference to railroads operated by private capital can be urged with equal force as to railroads operated by municipalities. Congress intended to and did occupy the whole field, and all state laws upon the subject, insofar as they cover the same field, are superseded."

And see *New Orleans Public Belt Railroad Construction,* 166 I. C. C. 761, and *New Orleans Public Belt Railroad Bridge Bonds,* 189 I. C. C. 156, where it is assumed without question that a railroad owned by a municipality is subject to the Interstate Commerce Act.

III

SECTION 6 OF THE SAFETY APPLIANCE ACT GIVES THE UNITED STATES DISTRICT COURT JURISDICTION OF THE PRESENT SUIT TO COLLECT FROM THE STATE OF CALIFORNIA THE PENALTY PRESCRIBED FOR VIOLATION OF THE ACT

Congress has the Constitutional power to give to the United States District Courts jurisdiction of suits by the United States against a State. "The judicial power", as defined in the United States Constitution, Article III, extends to suits by the United States against a State. *United States* v. *North Carolina,* 136 U. S. 211; *United States* v. *Texas,* 143 U. S. 621, 644, 645; 162 U. S. 1, 90; *United States* v. *Michigan,* 190 U. S. 379, 396; *Oklahoma* v. *Texas,* 258 U. S. 574, 581; *United States* v. *Minnesota,* 270 U. S. 181, 195; cf. *Monaco* v. *Mississippi,* 292 U. S. 313, 329. The reasons for this rule were well stated in *United States* v. *Texas, supra,* where it was said (pp. 644–645):

> We cannot assume that the framers of the Constitution, while extending the judicial power of the United States to controversies between two or more States of the Union, and between a State of the Union and foreign States, intended to exempt a State altogether from suit by the General Government. They could not have overlooked the possibility that controversies, capable of judicial solution, might arise between the United States and some of the States, and that the permanence of the Union might be endan-

gered if to some tribunal was not entrusted the power to determine them according to the recognized principles of law.

Moreover, Congress can, if it chooses, provide that this judicial power over a suit between the United States and a State shall be exercised by inferior courts established by Congress. *Ames* v. *Kansas,* 111 U. S. 449; *United States* v. *Louisiana,* 123 U. S. 32. In the first of these cases, the State of Kansas had brought suit in its own courts against a corporation created under federal law upon a cause of action arising under the laws of the United States. The defendant corporation removed this case to the United States Circuit Court. The State objected to this removal and sought a remand to the state court on the ground that Congress as a matter of Constitutional power could not authorize, and as a matter of statutory power had not authorized, suit in the Circuit Court where a State was a party. This Court in over-ruling the objections held that it was "within the power of Congress to grant to the inferior courts of the United States jurisdiction in cases where the Supreme Court has been vested by the Constitution with original jurisdiction." In the second case, *United States* v. *Louisiana, supra,* it was held that the Court of Claims had jurisdiction to entertain a suit by the State of Louisiana against the United States.

In the two cases cited, it is true, the action was brought *by* a State, and not *against* it. But the Constitutional principle is the same whether the

suit in an inferior Federal court is brought with or without the consent of the State. This is shown by *Ames* v. *Kansas, supra,* where the State objected to having its suit removed to an inferior court of the United States. And it is also demonstrated by *Börs* v. *Preston,* 111 U. S. 252, (a case much relied upon in *Ames* v. *Kansas, supra*) which held that consuls, who, like States, may, under United States Constitution, Article III, be parties to original actions in the Supreme Court, can also be sued in inferior courts of the United States, if Congress so provides.

The Constitutional power of Congress being clear, the only question is whether, as a matter of statutory interpretation, Congress has in fact exercised this power to grant to the United States District Courts jurisdiction of a suit brought by the United States against a State for violation of the Safety Appliance Act.

Section 6 of the Safety Appliance Act, as amended April 1, 1896, c. 87, 29 Stat. 85 (U. S. C., Title 45, Section 6) provides:

> Any common carrier engaged in interstate commerce by railroad using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the preceding provisions of this chapter, shall be liable to a penalty of $100 for each and every such violation, to be recovered in a suit or suits to be brought by the United States district

> attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; * * *

On its face this section embraces all suits for penalties against "any common carrier engaged in interstate commerce", whether that carrier be a private corporation or a State; and this broad literal interpretation has particular force because of the general procedure which the section embodies. It selects as an appropriate forum for trial of a violation of the Act "the locality where such violation shall have occurred." Presumably, this choice was made in order to make it relatively easy for railroad workers, travelers, shippers, and others who in ordinary course would feel aggrieved to lodge a "duly verified information" and to testify. If the alleged offender were to be tried elsewhere than in the neighborhood, workers, travelers, shippers, and others might be less inclined to complain or to volunteer their testimony, and thus the policy of the Safety Appliance Act might be indirectly frustrated. Moreover, that Congress intended the United States District Court to be the forum for all suits under the Safety Appliance Act appears from the fact that the very provision which imposes the penalty also stipulates that it "be re-

covered in a suit or suits to be brought * * * in the district court of the United States."

The contrary view that Section 6 should be read narrowly, and suits against a State exempted from its operation, rests on two arguments: the first, one of technical statutory construction; and the second, one of policy.

The technical argument is based on Section 13 of the Judiciary Act of 1789, c. 20, 1 Stat. 73, 80, which, as amended from time to time is now embodied in Section 233 of the Judicial Code (U. S. C., Title 28, Sec. 341), *supra,* p. 3. It is argued that the Judiciary Act conferring upon this Court "exclusive jurisdiction of all controversies of a civil nature where a State is a party" states the applicable procedure. If it be assumed that the present suit is not alone a civil action, but also one "of a civil nature", (but see *Wisconsin* v. *Pelican Insurance Co.,* 127 U. S. 265), and that an irreconcilable conflict exists between the two statutes, on general principles of statutory construction it is the later statute which governs and which impliedly pro tanto repeals the earlier statute. *United States* v. *Yuginovich,* 256 U. S. 450, 463; *United States ex rel Chandler* v. *Dodge County Commissioners,* 110 U. S. 156; *United States* v. *Tynen,* 11 Wall. 88, 92. This principle makes Section 6 of the Safety Appliance Act the governing statute in this case, since it is the later statute. Section 13 of the Judiciary Act of 1789 has not been reenacted since 1893, the

date of the original Safety Appliance Act, but has been merely carried forward into the Judicial Code and the United States Code. In neither case is this codification the equivalent of a reenactment. Section 297 of the Act of March 3, 1911, c. 231, 36 Stat. 1169; Section 2 (a) of the Act of June 30, 1926, c. 712, 44 Stat. 1 (Part 1); *Smiley* v. *Holm,* 285 U. S. 355, 373.

It is also argued that there is a general policy against allowing a case involving a State to be adjudicated elsewhere than in this Court. *Ames* v. *Kansas, supra,* indicates that there is no such policy, for in that case, as already pointed out, an inferior court was held to have jurisdiction of a case involving a State even though the State objected. And if there were such a policy, it should be restricted to suits involving the action of a State in its sovereign, and not in its proprietary, capacity. When a State engages in a business of a private nature, it should not be immune from the burdens which apply to others who engage in like enterprises. Cf. *Ohio* v. *Helvering,* 292 U. S. 360; *Board of Trustees* v. *United States;* 289 U. S. 48; *South Carolina* v. *United States,* 199 U. S. 437.

Finally, it may be suggested that if considerations of policy are indulged, there should be weighed against any asserted inconvenience and loss of dignity to a State in being subjected to a trial in the District Court, the inconvenience to this Court, and the departure from its ordinary functions, in taking or analyzing evidence with respect to offenses usu-

ally involving unimportant issues of law and minor penalties. In construing the Judiciary Act of 1789, and determining the exclusive jurisdiction of this Court, practical difficulties and "tacit assumptions" ought to be taken into account. Cf. *Popovici* v. *Agler,* 280 U. S. 379, 383. One set of such practical difficulties would arise from a trial before this Court, or argument before this Court on the basis of evidence taken before a Commissioner with respect to a cause of action arising in a distant place. Indeed it is not clear that there might not be a jury trial in this Court instead of proceedings before a Commissioner. Although such a trial is not required by the Seventh Amendment to the United States Constitution or by any statute, it could be prescribed by this Court in suits at law before its bar in order to conform with the procedure in other courts which try cases at law. Cf. *State of Georgia* v. *Brailsford,* 3 *Dallas* 1 (where this Court prescribed a jury trial, although one of the defendants was an alien, and hence not entitled by statute to trial by jury). Such trials, or, indeed, any proceedings involving nothing more than the factual analysis and summation of the sort of evidence customary in cases arising under the Safety Appliance Act would be a serious burden to a tribunal entrusted with the important functions and burdened with the crowded docket of this Court.

CONCLUSION

In view of the foregoing, we respectfully submit that the decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

STANLEY REED, *Solicitor General.*
JOSEPH B. KEENAN,
Assistant Atorney General.
GOLDEN W. BELL,
Assistant Solicitor General.
DAVID V. CAHILL,
M. S. HUBERMAN,
CHARLES E. WYZANSKI, JR.,
Special Assistants to the Attorney General.
DANIEL W. KNOWLTON,
Chief Counsel,
M. C. LIST,
Attorney, Interstate
Commerce Commission,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 33

THE UNITED STATES,
Petitioner,

vs.

THE STATE OF CALIFORNIA.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth District

BRIEF FOR THE STATE OF CALIFORNIA

U. S. WEBB,
Attorney General of the State of California.

RALPH O. MARRON,
Deputy Attorney General.

CALIFORNIA STATE PRINTING OFFICE

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BRIEF FOR THE STATE OF CALIFORNIA

The brief for the United States clearly and concisely states the facts of the case and we have nothing to add to that statement.

ARGUMENT

I

THE STATE OF CALIFORNIA OPERATING THE STATE BELT RAILROAD IN THE MANNER DESCRIBED IN THE STIPULATION OF FACTS IS NOT A COMMON CARRIER ENGAGED IN INTERSTATE COMMERCE

We will concede that whether a transportation agency is a common carrier does not depend upon whether its charter declares it to be a common carrier, but upon what it does. We will likewise concede that the question whether a particular railroad is a common carrier is not affected by the fact that such railroad may be owned and operated by a state. We do maintain, however, that the manner of operation and control, and the functions performed by the State of California in the operation of the State Belt Railroad are not sufficient to constitute that railroad a common carrier engaged in interstate commerce by railroad.

The State of California, in the operation of the State Belt Railroad, has no property other than locomotives and tracks, all located upon property which belongs to the state except as to certain trackage on government property. The state issues no bills of lading, nor does it move any cars on waybills. The state is not a party to any through rate agreement nor to any agreement or contract with shippers or consignees.

In the operation of the State Belt Railroad the state renders a mere switching service charging a flat rate per car for switching without respect to the point of origin or destination of such car, or the weight or quantity of the contents thereof. The switching rate is a little higher for a loaded car, however. The switching rate is paid by the carrier from whom the car is received. The State of California has never assumed nor recognized any of the liabilities or responsibilities of a common carrier.

The service rendered by the State of California in the operation of the State Belt Railroad is identical with the service rendered by the Kentucky and Indiana Bridge Company. In *Kentucky & Indiana Bridge Co.* vs. *Louisville & Nashville Railroad Co.*, 37 Fed. 567, 2 L. R. A. 289, the court, in considering the service rendered by the Kentucky & Indiana Bridge Co. and in concluding that such service did not constitute the bridge company a common carrier engaged in interstate commerce, said at page 615:

> "* * * that petitioner is not, in law or in fact, a common carrier of property or freights within the true meaning of section 1 of the act to regulate commerce, and that in respect to freight which it offers or seeks to have interchanged with respondent at said Seventh and Magnolia connection it is only a transfer company or agency *engaged in performing a switching service, for which it demands and receives from the party for whom such service is rendered, not traffic rates on the freight transported or transferred, but simply a switching charge for the*

shifting of cars, loaded or empty, from one line of connection to another."

The line of demarcation between a common carrier engaged in interstate commerce by railroad and a carrier not so engaged may in many instances be fine. The question whether a carrier is a common carrier engaged in interstate commerce by railroad must be determined in each case by a consideration of the character of services rendered by such carrier and the relation of such services to the transshipment of goods or persons in interstate commerce.

It is claimed by the United States that the services performed by the State Belt Railroad are not substantially different from those performed by the Brooklyn Terminal, and the case of *United States* vs. *Brooklyn Eastern District Terminal,* 249 U. S. 296 is relied upon and quoted from extensively. However, a consideration of the facts of that case discloses that the elements relied upon by this court in reaching the conclusion that the Brooklyn Terminal was a common carrier engaged in interstate commerce are not present in the instant case. The Brooklyn Terminal operated a union freight station under individual contracts with ten interstate railroads and several steamship companies. The terminal received from shippers and loaded upon cars both carload and less than carload outgoing freight. For its services in handling freight the terminal charged at the rate of 3 cents for 100

pounds of freight moving to or from points east of the western termini of the railroads, and 4 1/5 cents on freight moving to or from points beyond such terminals. The terminal issued bills of lading and its docks and warehouses were public freight stations of the railroads. This court, in concluding that the terminal was a common carrier engaged in interstate commerce by railroad, said at page 306:

> "What the Terminal contracts to transport, however, is not primarily cars, but their contents. Its compensation is measured not by the weight, size, or character of the car, but by the weight and the origin or destination of the goods carried therein. These goods the Terminal must, under its contracts with the railroad companies, receive and carry at the rates specified for all who offer them, as fully as the railroad companies do at their other stations."

Certainly what this court said with reference to the terminal can not be said of the State Belt Railroad. (See stipulation of facts.) Likewise, the cases, *U. S.* vs. *Union Stockyard,* 226 U. S. 286, *U. S.* vs. *Sioux City Stockyards Co.,* 162 Fed. 556, *Union Stockyards Co.* vs. *U. S.,* 169 Fed. 404, *U. S.* vs. *Atlanta Terminal Co.,* 260 Fed. 779, are all distinguishable from the instant case upon their facts, and the elements upon which the courts based their conclusions that the various carriers were common carriers engaged in interstate commerce by railroad are not present in the instant case.

While it is true that in *M'Callum* vs. *U. S.*, 298 Fed. 373, followed in *Tilden* vs. *U. S.*, 21 Fed. (2d) 967, the Circuit Court of Appeals for the Ninth Circuit Court held the State Belt Railroad to be a common carrier engaged in interstate commerce by railroad, the force of those decisions and the consideration due them was destroyed by the fact that, subsequent to those decisions, the Circuit Court of Appeals for the Ninth Circuit certified to this court the question, among others, whether the State Belt Railroad was a common carrier engaged in interstate commerce.

Sherman vs. *United States*, 282 U. S. 25.

While the court declined in the *Sherman* case to pass upon the questions certified to it by the Circuit Court of Appeals, Mr. Justice Holmes, in speaking for the court, stated:

> "California has not gone into business generally as a common carrier, but simply has constructed the Belt line as an incident of its control of the harbor—a State prerogative."

The State of California, in its operation of the State Belt Railroad, is not engaged in the business of a common carrier and is not engaged in the business of handling interstate or any commerce. Its sole activity is the switching of cars at a per car charge in and around its own docks and over its own property in connection with the maintenance and improvement of San Francisco Harbor.

II

THE STATE BELT RAILROAD OWNED AND OPERATED BY THE STATE OF CALIFORNIA IN THE MANNER DESCRIBED IN THE STIPULATION OF FACTS IS NOT SUBJECT TO THE FEDERAL SAFETY APPLIANCE ACT

(a) The operation of the State Belt Railroad is the exercise of a governmental function

The stipulated facts in this case show that the State Belt Railroad is operated by the State of California for the purpose of facilitating the commerce of the Port of San Francisco without any profit being derived from such operation. The charges for the switching services rendered by the State Belt Railroad are fixed by the Board of Harbor Commissioners pursuant to the authority conferred upon that board by section 2524 of the Political Code of California which authorizes the board to collect such amount of revenue as will enable it to perform the duties required of it by Article IX of said code.

Section 2526 of the Political Code provides:

> "No greater amount of money shall, in the main, ever be collected, by the collection of dockage, wharfage, tolls, rents, and cranage, than shall be necessary to construct and keep in repair such number of wharves, piers, landings, and thoroughfares, construct sheds, dredge such number of slips and docks, construct a sea-wall and harbor embankment, and pay incidental expenses allowed to be paid by this article."

It is apparent from this provision that the State of California is not operating the facilities of San Francisco Harbor in a proprietary capacity. If the State of California were a common carrier engaged in interstate commerce, the fixing and regulation of tolls and charges would be subject to the jurisdiction of the Interstate Commerce Commission, and it is conceivable that that commission might require the collection of tolls and charges which would exceed the amount required for the maintenance and improvement of the harbor, and the Board of Harbor Commissioners would find itself in this anomalous situation: The legislature which created that board has prohibited the collection of a greater amount of money by the board than is necessary to maintain and improve the harbor and the Interstate Commerce Commission, by its order, might require that the board disobey the plain mandate of the California Legislature.

The State Belt Railroad is operated under the immediate supervision of a superintendent who is appointed by and holds office at the pleasure of the Board of Harbor Commissioners and under that board's general supervision and control. All inspectors, engineers and yardmen employed in the operation of the railroad are Civil Service employees except in cases of emergency employment. All superintendents, inspectors, engineers, yardmen and other employees engaged in the operation of the State Belt Railroad are employees and servants

of the State of California. (Transcript, pp. 26 and 27.)

The Supreme Court of California has declared that the operation of the facilities of San Francisco Harbor through the Board of Harbor Commissioners is the exercise of a sovereign function on behalf of the state.

In *Denning* vs. *State,* 123 Cal. 316, the Supreme Court of California said at pages 321 and 322:

> "These provisions of the constitution clearly show that the State has retained control of the harbor and frontages thereon for the use and benefit of the people, for the promotion of commerce and the general benefit of the body politic, and not as a mere business enterprise through which profits may accrue to the state treasury; and the statute creating the state board of harbor commissioners is intended and adapted to the execution of this purpose. It gives, it is true, various powers to that board, and imposes upon it various duties, some of them of a character which, under certain circumstances, may give a cause of action against the state. * * * But the powers and duties of the board are diversified. It has control of the bay and of the vessels using it; keeping open passageways for the ferry boats; controlling the anchorage of vessels; removing vessels from the wharves and piers when unloaded, and the general care of all the property belonging to the State and connected with the wharves and piers, or used by said board. These duties are of a police character and purely governmental.

"The fact that the board is authorized or required to collect tolls and charges for dockage and warfage to such extent 'as will enable the commissioners to discharge the duties required of them by the act' does not affect its character as a governmental agency."

This court, in *Sherman* vs. *United States, supra,* indicated a similar conclusion. It was there said:

"The matters complained of occurred upon what is known as the State Belt Railroad. The road is about five miles long, within the City of San Francisco, runs nearly parallel with the waterfront of the harbor, and connects many industrial plants and the line of the Southern Pacific Railroad Company with wharves belonging to the State and through the wharves with other common carriers engaged in interstate commerce by railroad. It may be assumed that the work done upon the Belt Line was interstate commerce. *But the line belongs to and is operated by the State; the work is done without profit for the purpose of facilitating the commerce of the port, and the funds received after paying expenses go to the Treasury of the State to the credit of the San Francisco Harbor Improvement Fund. California has not gone into business generally as a common carrier but simply has constructed the Belt Line as an incident of its control of the harbor—a State prerogative."* (Italics ours.)

While it is conceivable that a sovereign state may so maintain and operate a harbor that it *might* be said that such state was doing so in a proprietary

rather than a sovereign capacity, the facts of the instant case preclude any such conclusion. It is of the utmost concern to a state that its ports and harbors be properly managed, controlled and regulated in order to promote the general benefit of the body politic, and when a state manages and controls its ports and harbors with that end in view and not actuated by a desire for profit, the state is acting in its sovereign capacity.

The cases relied upon by the United States, *Helvering* vs. *Powers,* 293 U. S. 214 (operation of a street railway), *South Carolina* vs. *United States,* 199 U. S. 437 (sale of liquor under dispensary system), *Ohio* vs. *Helvering,* 292 U. S. 360 (sale of liquor through state owned stores), are not in point for in each of those cases by no stretch of the imagination could it be said that the particular functions performed by the state were sovereign. Admittedly, in those cases the states were acting in a proprietary capacity and acting in that capacity, in so far as their activities with reference to that particular business were concerned, were amenable to the federal taxing power.

Indeed, this court has recognized that in order to subject a state to the federal taxing power it is necessary that such state be engaged in a private undertaking. In *Georgia* vs. *Chattanooga,* 264 U. S. 472, 481–482, the court characterized the construction of a railroad in Tennessee as a "private undertaking" with respect to which Georgia was

in the same position as a "private corporation authorized to own and operate a railroad," and has "divested itself of its sovereign character." See *United States* vs. *Planters' Bank,* 9 Wheat. 904; *Bank of Kentucky* vs. *Wister,* 2 Pet. 318, 323; *Curran* vs. *Arkansas,* 15 How. 304, 308.

It has been expressly held that the operation and control of port facilities is a sovereign function.

In *Commissioner of Internal Revenue* vs. *Ten Eyck,* 76 Fed. (2d) 515 (C. C. A. 2d Circuit) the Commissioner of Internal Revenue sought to tax under the Revenue Act of 1928 the salary of the respondent, chairman of the Albany Port District Commission. In holding the salary exempt from such taxation the court said, 517, 518,

> "It (the Commission) did operate the railroad, and charged rates authorized by the Interstate Commerce Commission. But we think that this terminal was intended as an instrument of government rather than of commerce only. In providing it and operating it, the state of New York was engaged in a usual governmental function as distinguished from a proprietary function."
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> * * * * *
>
> "Therefore, it is clear that ownership, control, and operation of port facilities are essentially and usually prerogatives of sovereignty; especially of the sovereignty of the constituent state governments of the United States. In England and in Scotland, the right to erect a port was part of the royal prerogative. No port could exist except under the authority of the sovereign. (Citing cases.)

> The governmental character of public wharves, or piers as well as rights in navigable water and landing places, have been recognized by the courts. (Citing cases.)"

It is stated in the brief for petitioner that the state, by undertaking the operation of the railroad has to that extent divested itself of sovereignty, and has to that extent placed itself in the position of private individuals or private corporations engaged in such enterprise. Such statement begs the question for, while it may be that when a sovereign state engages in a private enterprise it divests itself of its sovereignty with respect to such enterprise, certainly the discharge of a purely governmental or sovereign function does not result in divestment of sovereignty. No facts with relation to the operation of the State Belt Railroad are pointed out by the United States which would in any way indicate or lend support to a conclusion that the state was engaged in a private or competitive enterprise as distinguished from a sovereign function.

(b) Congress has no power to impose a penalty on a state when such state is engaged in the discharge of a sovereign function

We have hereinbefore conceded that when a state enters a proprietary field it is with respect to its activities within that field divested of sovereignty and subject to the same limitations and penalties as any private person or corporation. It is, however, well established that the federal government may

not subject a state or its governmental agencies to taxation or regulation provided those agencies are engaged in the discharge of governmental functions, one of the reasons for the rule being that the power to tax is the power to destroy.

McCulloch vs. *Maryland*, 4 Wheat. 316.

If the power to tax is the power to destroy, the power to fine or impose penalty is even a greater power to destroy. If it may be said that the State of California in the operation of the State Belt Railroad is subject to the provisions of the Federal Safety Appliance Act, it follows that the State of California, in the exercise of its governmental functions in facilitating and expediting the commerce of its principal port, may exist only by leave of the federal government, and that the power lies with that government to prevent the state from discharging its sovereign functions for the general welfare of the people of California. It means further that a sovereign state may be penalized for the misfeasances of its officers and agents notwithstanding that the state has not voluntarily assumed any liability for such misfeasance, for a state may act only through its officers and agents.

No principle of law is better established than the principle that a sovereign state is not liable for misfeasances, malfeasances or negligence of its officers, agents or servants unless such state has voluntarily assumed such liability. This principle

was announced by this court in *Robinson* vs. *Sichel*, 127 U. S. 507, where the court said, at page 515:

> "The government itself is not responsible for the misfeasances, or wrongs or negligences, or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs; since that would involve it in all its operations, in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests."

(c) The Federal Safety Appliance Act is not applicable to the State of California since states are not specifically referred to therein

The penalty provided by the Federal Safety Appliance Act is collected from the carrier operating the particular railroad. Section 6 of the Safety Appliance Act, as amended April 1, 1896, U. S. C. Title 45, provides:

> "*Any common carrier* engaged in interstate commerce by railroad using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the preceding provisions of this chapter, shall be liable to a penalty of $100 for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such

district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; * * *"
(Italics ours.)

It is well established that a sovereign is not bound by the words of a statute, unless expressly named therein, if the statute tends to restrain or diminish the powers, rights and interests of the sovereign.

In *Savings Bank* vs. *United States,* 86 U. S. 227, 239, the court said:

> "It is a familiar principle that the King is not bound by any act of Parliament unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him in the least, if they may tend to restrain or diminish any of his rights and interests. He may even take the benefit of any particular act, though not named. The rule thus settled respecting the British Crown is equally applicable to this government, and it has been applied frequently in the different States, and practically in the Federal courts. It may be considered as settled that so much of the royal prerogatives as belonged to the King in his capacity of parens patriae, or universal trustee, enters as much into our political state as it does into the principles of the British constitution."

In *New York* vs. *Irving Trust Company,* 288 U. S. 329, 331, this court, considering section 57(n) of the Bankruptcy Act, said:

"It is admitted here, that as the United States and the states are not mentioned in the limitation of Section 57, they are not bound thereby."

See, also, *United States* vs. *Herron,* 87 U. S. 251; *Guarantee Co.* vs. *Title Guaranty Co.,* 224 U. S. 152; *In re Fowble,* 213 Fed. 676; *Villere* vs. *United States,* 18 Fed. (2d) 409, certiorari denied, 275 U. S. 532.

In the light of the rule announced in these cases, had it been the intent of Congress to make this statute applicable to a sovereign state, it must be assumed that states would have been expressly referred to therein. In other words, had it been the intent of Congress to include within the provisions of the Federal Safety Appliance Act sovereign states discharging governmental functions, it must be presumed that the applicable provisions of the act would have provided, "any common carrier, *including states,* etc."

In *United States* vs. *Clausen,* 291 Fed. 231 (D. C. Washington) transferred to the Supreme Court by the Circuit Court of Appeals (9th Circuit), 293 Fed. 195, writ of error dismissed, 266 U. S. 641, the District Court held that the "Trading with the Enemy Act" giving the District Courts jurisdiction over proceedings under that act and defining "person" as including a "body politic" did not operate to give the District Court jurisdiction over a suit against the state, and speaking of the question the court said, at pages 237 and 238:

"Unless the words 'body politic,' occurring in the last-quoted section, were meant to include a state of the Union, as well as a municipality, there would, without question, be no authority for these proceedings. It has been held that the words 'body politic,' used in certain statutes, include a state. *Ervin* v. *State,* 150 Ind. 332, 48 N. E. 249, at 251. In holding that the United States could make a contract not previously directed by statute, Marshall, as Circuit Justice, held (*U. S.* v. *Maurice,* Fed. Cas. No. 15, 747):

'The United States is a government and consequently, a body politic and corporate, capable of obtaining the objects for which it was created. by the means which are necessary for the attainment.'

"It is well understood that this is a possessory suit, a seizure or capture on land, and that, as provided in the act, the rights of all interested are to be determined after the surrender of possession. Under its war powers, Congress doubtless could confer upon a District Court authority to coerce a sovereign state and its officers, but that it so intended is not lightly to be concluded in the absence of positive and express congressional enactment, particularly so in view of the provisions of section 233 of the Judicial Code (section 1210, Comp. Stats.), which provides:

'The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, or between a state and citizens of other states, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction.'

"This statute is controlling of this question, despite the fact that the present suit may not be purely a controversy of a civil nature. The dignified treatment and consideration due a sovereign state form no small part of the reason that has actuated the law-making powers in making a state subject alone to the jurisdiction of the Supreme Court. An implied repeal of the law conferring, so far as the courts of the United States are concerned, exclusive jurisdiction on the Supreme Court of suits against a state, is not to be sanctioned, in view of the long-established recognition of this principle in the history of the doctrine of state's rights."

The term "body politic" would more nearly evince an intention on the part of Congress to include a sovereign state than the term "common carrier." It should not lightly be held that it was the intent of Congress by the use of the term "common carrier" to strip a sovereign state of the dignity to which such state is entitled.

III

THE DISTRICT COURT HAD NO JURISDICTION OF THIS ACTION AGAINST THE STATE OF CALIFORNIA

The venue of any action against the State of California brought by the United States must be in the Supreme Court of the United States.

Constitution of the United States, Article III, Sec. 2;

State of Rhode Island vs. *The State of Massachusetts,* 12 Peters 657;
United States of America vs. *The State of Texas,* 143 U. S. 621.

We will concede the power of congress to invest inferior federal courts with jurisdiction over suits to which states are parties.

Ames vs. *Kansas,* 111 U. S. 449.

However, in light of the provisions of section 233 of the Judicial Code passed to give effect to the provisions of Article III, section 2, of the United States Constitution, providing that the Supreme Court shall have exclusive original jurisdiction over all controversies of a civil nature where a state is a party, it must follow that had congress intended to include within the provisions of the Safety Appliance Act a sovereign state, such state would have expressly been mentioned. Any argument to the effect that congress invested the district courts with jurisdiction in suits against a sovereign state for violations of the Federal Safety Appliance Act must rest upon the theory that the provisions of that act repeal by implication the provisions of section 233 of the Judicial Code.

The doctrine of supersession or repeal by implication is not favored by the courts. In *Great Northern Railway Co.* vs. *United States* (C. C. A. 8) 155, Fed. 945, affirmed 208 U. S. 452, Mr. Justice Van Devanter, then a member of the United States Circuit Court, said:

"* * * to establish a supersession or repeal of a statute by implication, it is not sufficient to show merely that a later statute, making no mention of the particular subject of the first, employs language broad enough to cover some part or all of it; for, as words are sometimes employed with less than their largest literal meaning, it must also appear that the two statutes cannot stand together, reasonable purpose and operation being accorded to each. (Many cases cited) Or, as the same thing is at times differently expressed, a statute couched in clear and explicit terms is not overthrown by possible, but not necessary, implications flowing from after legislation."

See also *Gay* vs. *Ruff*, 292 U. S. 25, 37; and *Knapp* vs. *Byram*, 21 Fed. (2d) 226, 227.

The reasons underlying the rule that repeals by implication are not to be favored are even more apparent when the doctrine of implied repeal is invoked against a state (*United States* vs. *Clausen*, *supra*). See also *United States* vs. *McIntosh*, 57 Fed. (2d) 573.

CONCLUSION

We respectfully submit that the decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

U. S. WEBB,
Attorney General of the
State of California.

RALPH O. MARRON,
Deputy Attorney General.

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SUPREME COURT OF THE UNITED STATES.

No. 33.—October Term, 1935.

United States of America, Petitioner, vs. The State of California. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[February 3, 1936.]

Mr. Justice Stone delivered the opinion of the Court.

This is a suit brought by the United States against the State of California in the District Court for northern California to recover the statutory penalty of $100 for violation of the federal Safety Appliance Act, § 2, Act of March 2, 1893, c. 196, 27 Stat. 531, 45 U. S. C. § 2, and § 6 of the Act as amended April 1, 1896, 29 Stat. 85, 45 U. S. C., § 6.[1]

The complaint alleges that California, in the operation of the state-owned State Belt Railroad, is a common carrier engaged in interstate transportation by railroad, and that it has violated the Safety Appliance Act by hauling over the road a car equipped with defective coupling apparatus. Upon the trial, without a jury, upon stipulated facts, the district court gave judgment for the United States. The Court of Appeals for the Ninth Circuit reversed, 75 F. (2d) 41, on the ground that as exclusive jurisdiction of suits to which a state is a party is conferred upon this Court by § 233 of the Judicial Code, 36 Stat. 1156, 28 U. S. C. 341, the

[1] "Section 2. It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

"Section 6. Any common carrier engaged in interstate commerce by railroad using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the preceding provisions of this chapter, shall be liable to a penalty of $100 for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; . . ."

district court was without jurisdiction of the cause. We granted certiorari, — U. S. —, to review the case as one involving questions of public importance, upon a petition of the government which urged that the state is a common carrier by railroad, subject to the Safety Appliance Act, and, under its provisions, to suit in the district court to recover penalties for violation of the Act.

In an earlier suit, *Sherman* v. *United States*, 282 U. S. 25, brought against the Board of State Harbor Commissioners, which supervises operation of the State Belt Railroad, to recover penalties for violation of the Act, this Court set aside the judgment of the district court for the government because the State had not been made a party.

1. Whether a transportation agency is a common carrier depends not upon its corporate character or declared purposes, but upon what it does. *United States* v. *Brooklyn Terminal*, 249 U. S. 296, 304. The State Belt Railroad is owned and operated by the state, see *Sherman* v. *United States*, *supra*. It parallels the water front of San Francisco harbor and extends onto some forty-five state-owned wharves. It serves directly about one hundred and seventy-five industrial plants, has track connection with one interstate railroad, and, by wharf connections with freight car ferries, links that and three other interstate rail carriers with freight yards in San Francisco leased to them by the state. It receives and transports from the one to the other, by its own engines, all freight cars, loaded and empty, and the freight they contain, offered to it by railroads, steamship companies and industrial plants. The larger part of this traffic has its origin or destination in states other than California. For the transportation service it makes a flat charge per car. It issues no bills of lading and is not a party to through rates. It moves the cars on instructions contained in "switch lists" made out by the delivering or receiving carrier, which pays the charge and absorbs it in its rate. The charge on cars not delivered to or received from another carrier is paid by the industry concerned.

The Belt Railroad is thus a terminal railroad for the industries and carriers with which it connects, and it serves as a link in the through transportation of interstate freight shipped to or from points in San Francisco over the connecting carriers. Its service is of a public character, for hire, and does not differ in any salient feature from that which this Court, in *United States* v. *Brooklyn*

Terminal, supra, 304, 305, held to be common carriage by rail in interstate commerce within the meaning of the federal Hours of Service Act, 34 Stat. 1415, 45 U. S. C., § 61.

The state insists that the facts that it maintains no freight station, issues no bills of lading, and is engaged only in moving cars for a flat rate instead of at a charge per hundred pounds of freight moved, distinguish the operation of its railroad from that of the Brooklyn Terminal. As the service involves transportation of the cars and their contents, the method of fixing the charge is unimportant. *Belt ~~Railroad Co.~~ Railway of Chicago* v. *United States,* 168 Fed. 542, 544; see *United States* v. *Union Stock Yard & Transit Co.,* 226 U. S. 286, 299, 300. And while maintenance of a freight station and the issue of bills of lading may be embraced in the service of a common carrier, and a part of interstate commerce, see *United States* v. *Ferger,* 250 U. S. 199; *Atchison T. & S. F. Ry. Co.* v. *United States,* 295 U. S. 193, they are not indispensable adjuncts to either where the subject of transportation, here cars loaded and empty, may be effected without.

All the essential elements of interstate rail transportation are present in the service rendered by the State Belt Railroad. They are the receipt and transportation, for the public, for hire, of cars moving in interstate commerce. See *United States* v. *Union Stock Yard & Transit Co., supra,* 299; *Union Stockyards Co.* v. *United States,* 169 Fed. 404; *Belt Railway of Chicago* v. *United States,* ~~168 Fed. 542.~~ Its service, involving as it does the transportation of all carload freight moving in interstate commerce between the industries concerned and all railroad and steamship lines reaching the port, is of the same character, though wider in scope, as that held to be common carriage by rail in interstate commerce in the *Brooklyn Terminal* and the *Union Stockyard* cases. They abundantly support the conclusion that such is the service rendered by the State in the present case, a conclusion twice reached by the Court of Appeals for the Ninth Circuit, see *McCallum* v. *United States,* 298 Fed. 373; *Tilden* v. *United States,* 21 F. (2d) 967.

2. The state urges that it is not subject to the federal Safety Appliance Act. It is not denied that the omission charged would be a violation if by a privately-owned rail carrier in interstate commerce. But it is said that as the state is operating the railroad without profit, for the purpose of facilitating the commerce of the port, and is using the net proceeds of operation for harbor improve-

ment, see *Sherman* v. *United States, supra*, *Denny* v. *State*, 123 Cal. 316, it is engaged in performing a public function in its sovereign capacity and for that reason cannot constitutionally be subjected to the provisions of the federal Act. In any case it is argued that the statute is not to be construed as applying to the state acting in that capacity.

Despite reliance upon the point both by the government and the state, we think it unimportant to say whether the state conducts its railroad in its "sovereign" or in its "private" capacity. That in operating its railroad it is acting within a power reserved to the states cannot be doubted. See *Puget Sound Power & Light Co.* v. *City of Seattle*, 291 U. S. 619, 624; *Green* v. *Frazier*, 253 U. S. 233; *Jones* v. *Portland*, 245 U. S. 217. The only question we need consider is whether the exercise of that power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution. The power of a state to fix intrastate railroad rates must yield to the power of the national government when their regulation is appropriate to the regulation of interstate commerce. *United States* v. *Louisiana*, 290 U. S. 70, 74, 75; *Wisconsin Railway Commission* v. *Chicago, B. & Q. R. R. Co.*, 257 U. S. 563; *Shreveport Rate Cases*, 234 U. S. 342. A contract between a state and a rail carrier fixing intrastate rates is subject to regulation and control by Congress, acting within the commerce clause, *New York* v. *United States*, 257 U. S. 591, as are state agencies created to effect a public purpose, see *Sanitary District of Chicago* v. *United States*, 266 U. S. 405; *Board of Trustees* v. *United States*, 289 U. S. 48; see *Georgia* v. *Chattanooga*, 264 U. S. 472. In each case the power of the state is subordinate to the constitutional exercise of the granted federal power.

The analogy of the constitutional immunity of state instrumentalities from federal taxation, on which respondent relies, is not illuminating. That immunity is implied from the nature of our federal system and the relationship within it of state and national governments, and is equally a restriction on taxation by either of the instrumentalities of the other. Its nature requires that it be so construed as to allow to each government reasonable scope for its taxing power, see *Metcalf & Eddy* v. *Mitchell*, 269 U. S.

514, 522-524, which would be unduly curtailed if either by extending its activities could withdraw from the taxing power of the other subjects of taxation traditionally within it. *Helvering* v. *Powers*, 293 U. S. 214, 225; *Ohio* v. *Helvering*, 292 U. S. 360; *South Carolina* v. *United States*, 199 U. S. 437; see *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151, 173, explaining *South Carolina* v. *United States, supra.* Hence we look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.

California, by engaging in interstate commerce by rail, has subjected itself to the commerce power, and is liable for a violation of the Safety Appliance Act, as are other carriers, unless the statute is to be deemed inapplicable to state-owned railroads because it does not specifically mention them. The federal Safety Appliance Act is remedial, to protect employees and the public from injury because of defective railway appliances, *Swinson* v. *Chicago, St. Paul, M. & O. Ry. Co.*, 294 U. S. 529; *Fairport, P. & E. R. R. Co.*, v. *Meredith*, 292 U. S. 589, 594; *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 17, and to safeguard interstate commerce itself from obstruction and injury due to defective appliances upon locomotives and cars used on the highways of interstate commerce, even though their individual use is wholly intrastate. *Southern Ry. Co.* v. *United States*, 222 U. S. 20; *Moore* v. *Chesapeake & Ohio Ry. Co.*, 291 U. S. 205, 214. The danger to be apprehended is as great and commerce may be equally impeded whether the defective appliance is used on a railroad which is state-owned or privately-owned. No convincing reason is advanced why interstate commerce and persons and property concerned in it should not receive the protection of the act whenever a state, as well as a privately-owned carrier, brings itself within the sweep of the statute, or why its all-embracing language should not be deemed to afford that protection.

In *Ohio* v. *Helvering, supra*, it was held that a state, upon engaging in the business, became subject to a federal statute imposing a tax on those dealing in intoxicating liquors, although states were not specifically mentioned in the statute. The same conclusion was reached in *South Carolina* v. *United States, supra;* and see *Helver-*

ing v. *Powers, supra*. Similarly the Interstate Commerce Commission has regarded this and other state-owned interstate rail carriers as subject to its jurisdiction, although the Interstate Commerce Act does not in terms apply to state-owned rail carriers. See *California* ~~*Canners*~~ *Co.* v. ~~*S. P.*~~ *Co.*, 51 I. C. C. 500, 502, 503; *United States* v. *Belt Line R. R. Co.*, 56 I. C. C. 121; *Texas State Railroad*, 34 I. C. C. Val. R., 276.

Respondent invokes the canon of construction that a sovereign is presumptively not intended to be bound by its own statute unless named in it, see ~~*Guaranty*~~ *Co.* v. *Title Guaranty Co.*, 224 U. S. 152; *United States* v. *Herron*, 20 Wall. 251; *In re Fowble*, 213 Fed. 676. This rule has its historical basis in the English doctrine that the Crown is unaffected by acts of Parliament not specifically directed against it. *United States* v. *Herron, supra*, 255; *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 239. The presumption is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated. See *Baltimore National Bank* v. *State Tax Commission of Maryland*, decided this day. We can perceive no reason for extending it so as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action. Language and objectives so plain are not to be thwarted by resort to a rule of construction whose purpose is but to resolve doubts, and whose application in the circumstances would be highly artificial. It was disregarded in *Ohio* v. *Helvering, supra*, and *South Carolina* v. *United States, supra*. See *Heiner* v. *Colonial Trust Co.*, 275 U. S. 232, 234, 235.

3. The jurisdiction of the district court to entertain suits by the United States against a State under the Safety Appliance Act turns on the construction to be given to § 6 of the Act in the light of § 233 of the Judicial Code. Article III, § 2 of the Constitution extends the judicial power of the United States and the original jurisdiction of the Supreme Court to cases "in which a state shall be a party." See *United States* v. *West Virginia*, 295 U. S. 463, 470, and cases cited. But Congress may confer on inferior courts concurrent original jurisdiction of such suits. *Ames* v. *Kansas*, 111 U. S. 449,

United States v. *Louisiana*, 123 U. S. 32; compare *Börs* v. *Preston*, 111 U. S. 252. Section 233 of the Judicial Code, 28 U. S. C., 341, originally enacted as § 13 of the Judiciary Act of 1789, 1 Stat. 80, became § 687 of the Revised Statutes, and was carried into the Judicial Code in 1911, 36 Stat. 1156. It gives to this Court "exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens or between a state and citizens of other states or aliens." The later enacted § 6 of the Safety Appliance Act, see *Smiley* v. *Holm*, 285 U. S. 355, provides that the penalty which it imposes is "to be recovered in a suit or suits to be brought . . . in the district court of the United States having jurisdiction in the locality where such violation shall have been committed. . . ."

If it be assumed that the present suit to recover the payment denominated a "penalty" by § 6 is a controversy of a civil nature, but see *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265; cf. No. 32, *Milwaukee County* v. *M. E. White Co.*, ~~decided December 9, 1935~~, it is by § 233 of the Judicial Code within the exclusive jurisdiction of this Court, unless that provision is supplanted with respect to suits such as the present by the provisions of § 6. Upon that assumption § 6 is in conflict with § 233 of the Judicial Code and supersedes it, *United States* v. *Yuginovich*, 256 U. S. 450, 463; *United States, ex rel. Chandler* v. *Dodge County Commissioners*, 110 U. S. 156; *United States* v. *Tynen*, 11 Wall. 88, 92, unless, again, the general language of § 6 is to be taken as not applying to suits brought against a state. Since the section which, as we have held, imposes the liability upon state- and privately-owned carriers alike, also provides the remedy and designates the manner and the court in which the remedy is to be pursued, we think the jurisdictional provisions are as applicable to suits brought to enforce the liability of states as to those against privately-owned carriers, and that the district court had jurisdiction.

296 U.S. 268.

If we lay aside possible doubts, whether the suit is of a "civil nature," in which case only does § 233 of the Judicial Code purport to make the jurisdiction of this Court exclusive, still, in construing the jurisdictional provisions of § 6 of the Safety Appliance Act practical convenience and "the tacit assumptions" upon which it is reasonable to suppose its language was used, see *Ohio, ex rel. Popovici* v. ~~*Alger*~~, 280 U. S. 379, 383, are not to be disregarded.

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The controversy in a suit authorized by § 6 is essentially local in character and involves issues for which a jury trial may be appropriate, compare *Georgia* v. *Brailsford*, 3 Dall. 1. Their adjudication often requires the presence, as witnesses, of railroad workers, shippers and others of the locality. These are considerations which undoubtedly led to the command that the suit should be brought in the district court of the "locality" where violations occur. They are considerations as applicable to suits against a state as to suits against a privately-owned railroad. The suggestion that it should be assumed that Congress did not intend to subject a sovereign state to the inconvenience and loss of dignity involved in a trial in a district court is not persuasive when weighed against the complete appropriateness of the court and venue selected for the trial of issues growing out of the particular activity in which the state has chosen to engage.

Reversed.